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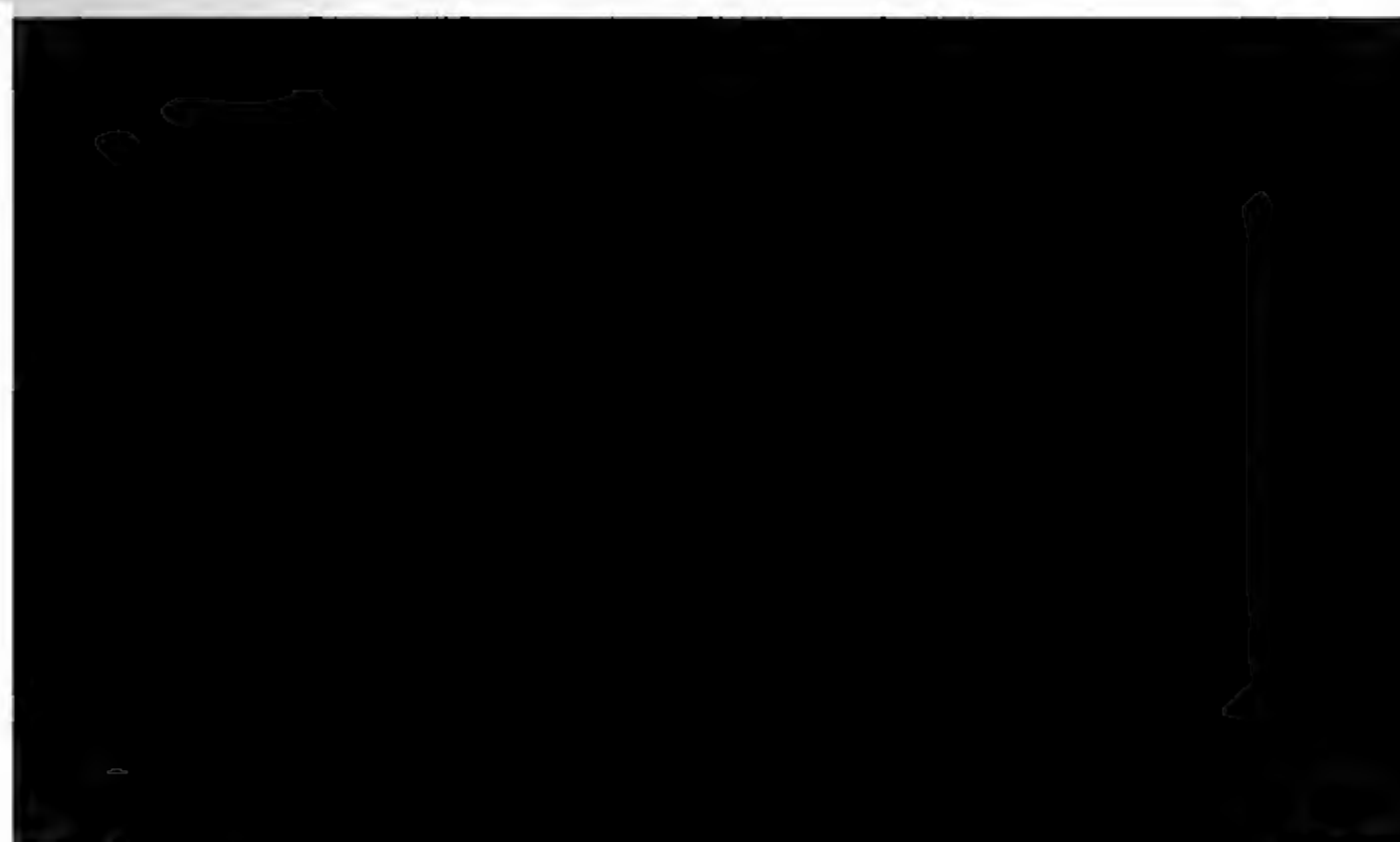
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R E P O R T S
OF
Cases
HEARD IN
THE HOUSE OF LORDS,
ON
APPEALS AND WRITS OF ERROR;
AND DECIDED
DURING THE SESSION
1821.

By RICHARD BLIGH, Esq.
OF THE HON. SOCIETY OF THE INNER TEMPLE,
BARRISTER AT LAW.

VOL. III.

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1827.

1875

1875

1875



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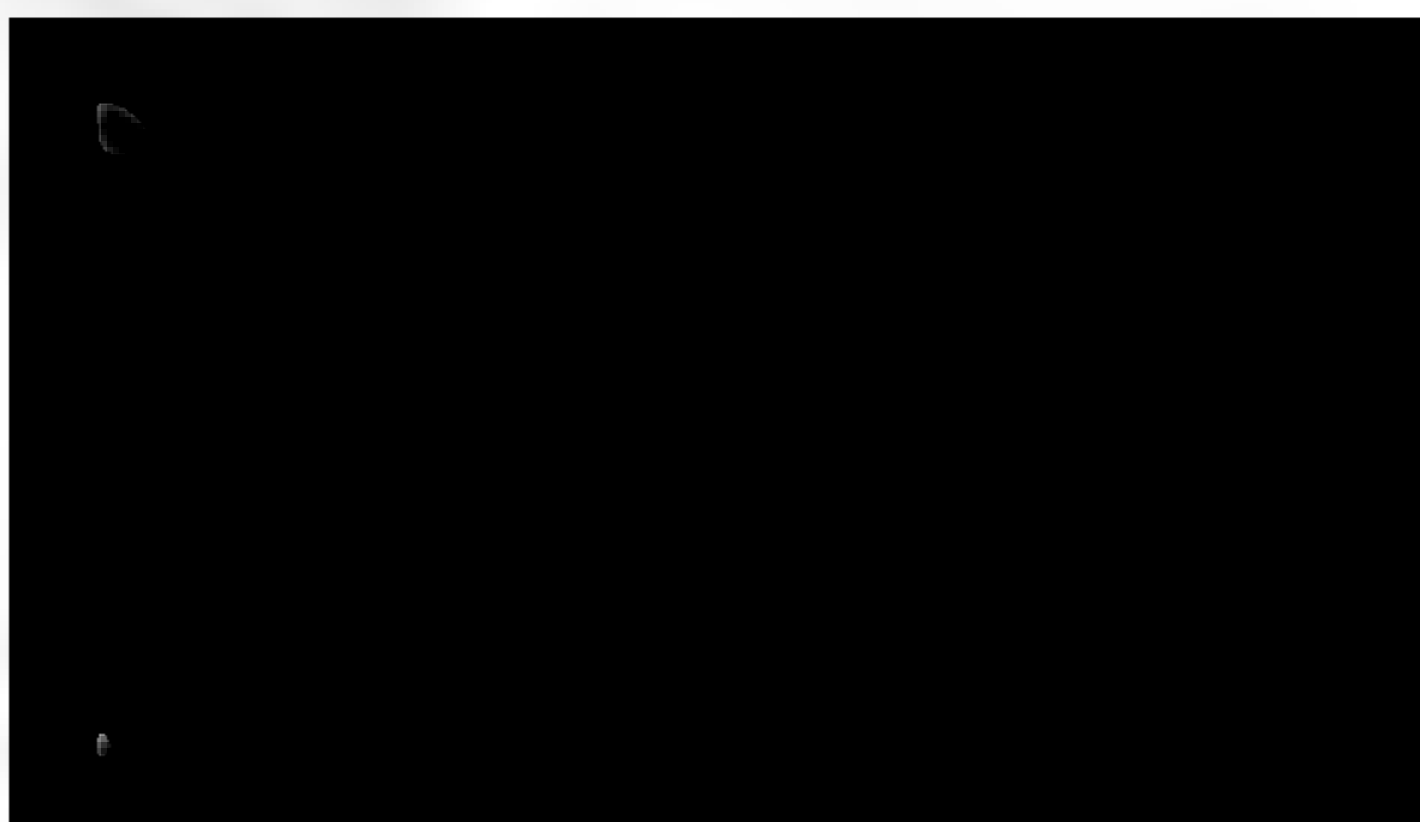
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REPORTS OF CASES

HEARD IN THE

HOUSE OF LORDS

UPON APPEALS AND WRITS OF ERROR,

And decided during the Session 1821,

2 GEO. IV.

ENGLAND.

(COURT OF CHANCERY *.)

SAMUEL WHALLEY, CHARLES
HARRISON and ELIZABETH his
wife, and CATHERINE GEOR-
GIANA WHALLEY - - - - } *Appellants;*

JOHN WHALLEY and DANIEL
WHALLEY - - - - - } *Respondents.*

THE purchase of a reversion, by a Nephew from an Uncle of very advanced age, for a price grossly inadequate, the deed of conveyance in the operative part, but not in the recitals, expressing that the grant was made partly in consideration of love and affection, not impeached on the ground of fraud under the circumstances.

A reversion, valued at 6,000*l.* and upwards, in consideration of annuities secured to be paid on the lives of two very old persons, and valued at less than 400*l.*, is conveyed by a deed executed by an Uncle, aged 80, in favour of a Nephew, who was so described in the deed. There was no recital that blood formed a part of the consideration; but in the operative part of the deed

* See the case in the Court below, 1 Meriv. 436.

CASES IN THE HOUSE OF LORDS

the grant is expressed to be made in consideration "of love and affection," as well as the annuities.

The grantor had previously made a valid will, devising the reversion to his Nephew, the grantee; and after the execution of the will, and before the grant, had sold part of the reversion, and received the price. The attorney (a stranger to both parties) who drew the will upon his own suggestion, but by the instructions of the Uncle, and the deed upon the instruction of both parties, was dead.

The deed was executed in 1773: the grantor died in 1774, leaving an heir, who died in 1791, not having impeached the deed. In 1794 the heir of the heir filed a bill to set aside the deed, on the ground of fraud, which bill was dismissed for want of prosecution.

In 1812 the devisees of that heir filed a new bill for the same purpose.

Held,—That the description of the party as a relation was equivalent to a recital; that the making the will was evidence of the truth of the consideration of love and affection; that the absence of recital did not afford sufficient ground to presume fraud, which being denied by the answer, and not proved in the cause, no issue ought to be directed, as the court of equity had before it sufficient evidence to decide the case; and on these grounds, and under these circumstances, that the conveyance was rightly held valid, and the bill properly dismissed; but no costs having been given in the Court below upon the decree of dismissal, that no costs ought to be given on affirming the decree upon the appeal.

The cause of action within the meaning of the statute of

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In September 1772, a notice to let being affixed on premises, part of the estates in question, Daniel Whalley, the nephew of Samuel, called on Mr. Garth, a respectable solicitor, who had acted for Mr. Eyre, the former owner, and had the management of the estates for the widow, but with whom Daniel was before unacquainted, to treat with him, as the agent of the widow, for renting the premises. Mr. Garth, in the course of this treaty, having stated that the premises could only be let upon the contingency of the widow's life interest, as he had been unable to discover the heir of J. Eyre, Daniel informed him that his uncle Samuel was the heir; and having afterwards brought his uncle to the office of Mr. Garth, he was informed of his right, and advised to dispose of the reversion by a will being drawn up in the office upon the suggestion of Mr. Garth, and Samuel Whalley being asked to whom he would devise the reversion, answered, to his nephew Daniel, whereupon the will was accordingly filled up, and executed on the 25th of September 1772.

After the date of the will, part of the lands were sold by agreement between the tenant for life and Samuel the reversioner, and Samuel received his share of the price. In 1772 an agreement took place between Samuel and Daniel for the sale and purchase of the residue of the reversion, by which it was agreed that Daniel should secure to Samuel an annuity of 80*l.* to be paid to Samuel during his life, and an annuity of 20*l.* to be paid to Martha Linwood for her life, commencing from the death of Daniel Whalley; and that Daniel should convey the reversion to Samuel. The annuities were after-

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wards, upon the suggestion of Daniel Whalley, increased to 100*l.* and 30*l.* respectively, and thereupon deeds of lease and release were prepared in the office of Mr. Garth. The deeds were dated in December 1772, and executed in January 1773. The release, describing Daniel as the son of Samuel's brother, recited the contract for sale, the consideration of the annuities, and the security given for payment of them; and witnessed, that in consideration of the annuities so secured, and *in consideration of the* natural love and affection which Samuel then bore to Daniel Whalley, he granted, &c. the freehold, and covenanted to surrender the copyhold estates, subject to the life-interest.

The reversion of the copyhold lands was surrendered to the use of Daniel Whalley according to the covenant.

Samuel Whalley died in 1774, leaving Peter Whalley his heir-at-law and customary heir, who died in 1791, having devised his freehold and copyhold lands to the Appellants, who at that time were infants, but afterwards, and as stated in the bill, lately obtained administration of his personal

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Chancery by the Appellants against Daniel Whalley, impeaching the sale and conveyance on the grounds of fraud, and gross inadequacy of price, stating the facts before mentioned, and praying an account of the rents and profits of the lands, and of waste done or permitted, from the death of Rebecca Eyre, the tenant for life, to the death of Peter Whalley, and a like account from that time, and a conveyance of the lands, &c.

This bill was afterwards amended, but not in any respect material to be noticed. The answer to the original and amended bill denied fraud; relied upon the consideration of love and affection, as expressed in the deed; and insisted upon the Statute of Limitations as a bar to the claim.

It appeared in evidence, by production of the bill of costs, upon the hearing in the Court below, and upon the appeal, that Daniel Whalley paid Garth for preparing the deed of conveyance, and the bonds to secure the annuities. By items of charge in the same bill, it appeared that Garth had managed the lands in question as steward or solicitor. It further appeared that the freehold lands, in 1773, according to a surveyor's valuation, were worth about 2,025*l.* and the copyhold about 4,200*l.* The defendant, by his answers, admitted that the reversion might at that time be worth 3,000*l.* It further appeared, by the valuation of an actuary, that the annuities were worth 389*l.* 14*s.* There was no direct proof of fraud.

The cause was heard at the Rolls, before Grant, M. R. who made a decree*, dismissing the bill

* See *Meriv. quâ. supra*,

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without costs. This decree being signed by the Lord Chancellor, and enrolled, was now brought by appeal before the House of Lords.

For the Appellants, *Mr. Wetherell* and *Mr. Wakefield*.

On the part of the Appellants it was argued, that under the circumstances of the case the length of time since the right accrued was no bar * to the suit ; that the conveyance ought to be set aside on account of the inadequacy of price, and the suspicious circumstances of the transaction † ; that the consideration of love and affection inserted in the operative part of the deed was fraudulent, and the absence of recital on that subject was proof of the fraud, and ought to control the operation of the deed ‡ ; that an issue to try the validity of the deed ought, at all events, to be directed §.

For the Respondents, *Mr. Hart*, and *Mr. Buck*.

If this were a case of mere bargain, being the sale of a reversion, the transaction, if it had been

blood. No Court can apportion what belongs to each. With what justice to the Respondent could an issue now be directed after a lapse of forty years, when the witnesses are dead who could have explained the transaction. There is no evidence of fraud; and the answer denies it. There is therefore no ground for an issue. In *Filmer v. Gott* the issue was directed upon a clear presumption of fraud, and the jury found that love and affection formed no part of the consideration. The grantor in this case died in 1774, and his heir must then have been apprised of the fact that he was disinherited by the will.

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The Lord Chancellor :—Is the will of Peter proved?

For the Respondents :—It was not thought material; because if the Appellants could not claim as devisees of Peter, one of them claimed as his heir-at-law.

Lord Chancellor :—It is material in this view, if the claim is by the heir-at-law; he, in 1794, filed a bill to set aside the conveyance, and suffered that bill to be dismissed for want of prosecution.

For the Respondents :—From 1782, when the tenant for life died, to 1791, when Peter Whalley died, no claim was made by him. Long delay, where no legal disability exists, is fatal to the claims of a suitor in a court of equity. Mr. Garth, the

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only person acquainted with the particulars of the transaction, died in 1792. How are the Respondents now to produce evidence to show absence of fraud, (if such evidence ought to be required,) but by the transaction itself? Part of the property was sold by the grantor; that is a proof of free-agency. He left abundant assets, which shows that he was not in a state of necessity: and that he was not in a state of imbecility is proved by the surrender of the copyhold.

This is not a case of direct trust, in which it may be admitted, as a general proposition, that length of time is no bar; this is a case where a party is to be declared a trustee upon the effect of evidence and constructive inference from the acts of the parties. In such cases courts of equity, by their own rules, give great effect to length of time. The statute has given the measure, and furnished the rule in equity, not merely in difficult cases, like the present, but even in cases where fraud is manifest*. Mrs. Eyre, the tenant for life, died in 1782; the reversion then fell into possession. There is no proof that Peter Whalley was then abroad; the cause of action

the parties, if it is doubtful in the operative part, but they have no distinct operation*.

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If fraud is to be implied from the absence of recital as to love and affection forming part of the consideration, it would be easy for persons intending fraud to have provided against such inference, by inserting a recital to that effect.

Lord Redesdale :—It is recited that Daniel, the grantee, is the son of John, the brother of the grantor.

Mr. Wetherell, in reply :—The time had not elapsed, according to the rule; it began to run only when the reversion fell in.

Lord Chancellor :—The cause of action arose when the party had a right to apply to a court of equity to set aside the deed. Peter had that right immediately after the death of Samuel.

Reply :—Where the subject of fraud is a reversion, the time has been reckoned from the falling into possession. Peter Whalley died abroad; and from the frame of the bill in 1794, it appears that nothing was known of the fraud. As to the respectability of the solicitor employed, the same argument might have prevailed in *Purcell v. Macnamara*†, and *Hudson v. Beauchamp*‡. In those cases the deeds were prepared in respectable offices.

* Bath and Montague's case, 3 Cases in Ch. 101. *Oliver v. Daniel* is misreported, 1 Meriv. 500. It is corrected in the *addenda*, p. 729.

† 14 Ves. 91.

‡ Not reported. See the note at the end of this case.

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Lord Redesdale:—You forget that Garth had the means of knowledge, which might not be the case in those offices. Garth let the estates, and must have known the value. The agreement for the leases of the house and farm show his knowledge.

Lord Chancellor:—He had the management of the farm. As to the annuities, the answer represents that 80*l.* was required by Samuel the grantor, and that 100*l.* was proposed by Daniel the grantee of the reversion.

Reply:—The neutrality of the solicitor, in not interfering to prevent an unfair transaction raises no presumption of fairness.

Lord Redesdale:—You are to make out that the words “love and affection” were fraudulently introduced into the deed.

Lord Chancellor:—*Filmer v. Gott* ought to have been decided without an issue. In that case there was not only no evidence that love and affection formed part of the consideration, but the contrary

The Lord Chancellor :— The question in this case is, whether a deed, executed in December 1772, is to be considered fraudulent, upon a suit instituted in 1812.

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There are two points :—1. On length of time. 2. On the nature of the transaction. But if, from the nature of the transaction, the deed is not to be considered as fraudulent, it is unnecessary to discuss the question of length of time.

It appears that J. Eyre, who was entitled to the reversion in fee of the estate in dispute, died in 1772 ; Rebecca Eyre, who was tenant for life, died in 1782.

It also appears that in the transactions forming the subject of this suit, Mr. Garth, a very respectable man, was employed as the attorney ; but undoubtedly his respectability cannot be used as evidence of the fairness of the transaction. There are attornies and conveyancers who do not think it their duty to decide what parties ought to do, but attend only to their instructions, and carry them into execution. That remark may apply to the cases of *Purcell v. Macnamara*, and *Hudson v. Beauchamp*, where highly respectable solicitors were employed in the transactions which formed the subjects of those causes ; yet the Court thought, from the relation of the parties, the nature of the conveyances, and other suspicious circumstances, furnishing a presumption of fraud, that investigation was necessary. I can recollect the time when counsel, being consulted, thought it a part of their duty to point out the propriety or impropriety of the transaction submitted to their consideration. But in this case it will be more satisfactory to consider the

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nature of the advice given by Mr. Garth, as bearing upon the transaction, than the respectability of his character.

It appears that Samuel Whalley was ignorant that the reversion had descended to him, until he was informed of the fact, in consequence of the application made by Daniel Whalley to Mr. Garth. The reversion was expectant upon a life-estate, vested in a person aged fifty-four, and S. Whalley was then eighty-three years of age. The estate, therefore, was not likely to be productive to him, unless it should be immediately converted into money.

Samuel Whalley died in 1774, leaving Peter Whalley his heir at law, who died abroad in 1791. But it does not appear by the answer, or by proof, whether, in the interval between his ancestor's death and his own, he resided abroad or in England permanently or occasionally.

Peter Whalley devised all his real and copyhold estates to the Appellants.

In the year 1794 a bill was filed in the Exchequer, by the Appellant S. Whalley, praying that this deed

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In this case my judgment will not proceed upon the doctrine cited, as to express or constructive trusts, or the distinction between them; nor shall I rely upon the lapse of time.

Those doctrines deserve serious consideration when cases arise which require it. In all cases, delay of suit, where parties are cognizant of their rights, and under no legal disability, must affect a tardy claim, as importing a conscious acquiescence in what they have supposed to be an adverse right.

In the case of *Filmer v. Gott*, the transaction purported to be a sale of the property, and upon the recital of the deed it appeared to be simply a sale; but in the operative part of the deed, love and affection was expressed as part of the consideration, and in fact there was blood enough to support that consideration. But in that case the grantor filed the bill to set aside the conveyance. There was no question as to length of time. It was contended, on the part of the Defendant, that the deed imported a consideration of blood, as well as money, and *prima facie* it was so; but the House of Lords (superfluously perhaps) sent the cause to be tried upon the question, whether love and affection formed any part of the consideration. It was considered, even in that case, that unless there was presumption, or proof, to destroy the effect of a consideration expressed in the deed, and to prove that there was nothing but pecuniary payment, though otherwise asserted in the deed, the Court was not at liberty to refuse to give effect to that which was expressed; but in fact, in *Filmer v. Gott* the issue was unnecessary. It was manifest that the Defen-

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dant considered himself a mere purchaser, and until the bill was filed he never thought of the consideration of love and affection. The grantor was in a state of partial incapacity, never intending to give any thing from love and affection; nor was it so considered by either party.

In questions of this kind it is necessary to look to the difference of facts and circumstances.

In this case it appears, that upon the death of John Eyre, from whom the reversion descended, it was unknown to Garth, who managed the property, who was entitled to the reversion as heir at law.

The information is obtained accidentally from Daniel Whalley, that his uncle Samuel is the heir; and he, upon being introduced to Garth fairly, as represented by the answer, devises the property to his nephew. The personal property is distributed under the administration of Peter, the Appellant's father, among the next of kin, and at that time no complaint is made of the deed. Upon the answer, unimpeached by other proof, the Defendant is entitled to credit; at least the Plaintiff must prevail by admissions in the answer, or proof in the

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pears, from the statement of the conversation between Garth and Samuel Whalley, that the reversion was willingly devised to Daniel. Garth attested the will; and if the testator had died the day after the execution, the validity of the will could not have been affected by the interposition of Garth; and in that view the will gives countenance to the subsequent deed.

In *Filmer v. Gott* the aunt had devised her estate to near relations, and had no intention to sell or give it to the nephew.

Here, at the date of the will, the old man had the intention to give the property to his nephew. The mode of selling for annuities was not impolitic for a man of eighty-one expecting a reversion subject to a life of fifty-four; and he had in fact joined with the tenant for life in selling a part of the property. He could not, therefore, be ignorant of his right and power to sell, nor entirely so of the value.

The deed *prima facie* is a grant, not only for a money-consideration, but for love and affection.

It is open to proof, that love and affection formed no part of the consideration; upon such proof it would be considered as a mere money bargain. It is urged, that the want of recital affords presumptive proof; but the deed in the description of the parties shows the relationship.

In *Filmer v. Gott*, if I had heard the case in the Court below, I should have decided without directing an issue, upon the ground that the answer did not set up the consideration of blood.

In this case the Defendant, by answer, insists that the grant was made upon the consideration of love as well as money; and the oath of the Defen-

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dant must prevail in the absence of proof to the contrary. The witnesses who could explain the transaction are dead; and it would be unjust to the grantee to submit the case now to a jury, at the risk of deciding against the judicial presumptions arising from the expressions of the instrument, the oath of the Defendant in his answer, and the absence of other evidence to affect the answer.

Lord Redesdale:—It would be attended with infinite mischief if courts of equity were to hesitate in deciding questions, when sufficient evidence is before them. In such cases they are more competent than a jury. Issues are usually, (or ought only to be,) directed in those cases where evidence is wanting; and it is only in those, because the mode of examination is more effectual at common law, that issues are directed in equity. Here, according to the answer, the attorney was employed by both parties; and in such cases it is at least gross negligence of duty in the attorney not to see that the transaction is fair.

To suppose that Garth, without instructions, in-

serted the consideration of law and equity, is to

of the statute to prevent the discussion of questions upon title when evidence has perished. In this case Garth, if living, could have decided the question.

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If he had deposed that he inserted the words to give colour to the deed, that would have been a ground to rescind it; if he confirmed the representations made in the answer of the Defendant, the deed must have been supported. Those representations must now be presumed true, because the Appellants, by their delay, have deprived the Respondents of the evidence of Garth.

Under such circumstances length of time, if it had been less, would have been a sufficient ground for rejecting this application to Equity. Courts of Equity have always followed the statute of limitations; they are bound to act according to the spirit of that statute; and even in cases where it is not too late to maintain an ejectment, courts of equity have refused to interfere, because evidence has been lost.

The lapse of time is fatal to the claim of the Appellants. The parties having a claim were bound to proceed while the evidence of Garth was to be had, unless his death had happened very soon after the transaction.

Samuel Whalley, the grantor, had a right to impeach the deed, if fraudulent. The cause of action then existed; and thirty-nine years having since elapsed it would be grossly unjust now to rescind the deed, unless there were some evidence of fraud upon the face of the instrument.

The only ground stated by the Appellant is the

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absence of recital as to the consideration of love and affection; but the grantee is described as the son of John, the brother of the grantor, and that is equivalent to such a recital. There is no internal evidence of fraud, and the will proves decisively that such a consideration in part existed; what ground is there to impeach the will? There is, therefore, positive evidence of the existence of the consideration, and nothing to rebut it.

As no costs were given below, that is a circumstance always regarded in the decision of appeals; and therefore no costs ought to be given here in this case.

Decree affirmed 7th February 1821.

Reg. Lib. 1819, A. 1745.

HUDSON v. BEAUCHAMP.

The bill in this case was filed by Humphrey Hudson, as sole next of kin of Anne Hudson, whose maiden name was Beauchamp, stating, that he had procured letters of administration to her effects; that she, when living,



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mind; had taken her away from her residence at Twickenham, and secluded her from intercourse with her relatives, friends and acquaintance; had treated her as a child, and exercised an uncontrolled dominion over her imperfect faculties; that shortly after her removal from Twickenham, the defendant, by undue means, upon his own suggestion, and by direct instigation, prevailed on Anne Hudson to transfer all her stock in the public funds into the joint names of herself and the defendant, to execute a deed of gift to him of all her estate and effects, and, moreover, to make a will bequeathing all her personalty, except two small legacies, to the defendant; that the plaintiff had commenced proceedings in the Ecclesiastical Court against the defendant to recall the probate of the will; upon these allegations the bill prayed, that the deed might be delivered up to be cancelled, and an injunction to restrain the defendant from transferring the stock or receiving the dividends.

To this Bill a demurrer was in the first instance put in, upon the ground, that the plaintiff had, by his own shewing, proved the title to be in the defendant, who, as he stated in his bill, had obtained probate of the will. This demurrer was afterwards abandoned.

On the 20th of July 1820, upon a motion before the Lord Chancellor, supported by affidavits, stating the facts before mentioned, and various instances of imbecility on the part of Anne Hudson, and of influence and coercion on the part of the defendant, an injunction was granted according to the prayer of the bill, until answer or further order.

In delivering his opinion upon the motion, the Lord Chancellor considered the accumulation of the will upon the deed of gift as a badge of fraud. He seemed to doubt the validity of instruments, obtained under the circumstances appearing in the affidavits, and dwelt particularly on the impropriety of the transfer of the stock into the

1821. joint names, which deprived Ann Hudson of the power to deal with it.*

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The suit instituted in the Ecclesiastical Court was pending till 1823, when a sentence† was pronounced by Sir J. Nichol in favour of the will. In Michaelmas Term 1823, on the application of the defendant, stating that the answer had been put in denying all the plaintiff's equity, the injunction was dissolved.

One of the points made by the answer to rebut the charge of fraud was, that the instruments were prepared in the office of respectable solicitors.

* For the account above given of what passed on the hearing of the motion, the editor is indebted to Sir George Hampson and Mr. Wilbraham, who were opposed to each other as counsel in the cause.

† [In delivering judgment, Sir J. Nichol made the following general observations.]

The case set up in argument was a case of fraudulent circumvention, practised on an impaired capacity. This is a case which certainly may exist. It is a mixed case, consisting of two ingredients, namely, weakened capacity and fraudulent circumvention; and the quantity and degree of each of these ingredients must therefore be examined into. If the degree of capacity is important, if very much reduced, slighter evidence of fraud and deception would be sufficient; whereas if the capacity was quite perfect, or nearly perfect, more clear proof of fraudulent circumvention would be required. Faculties so impaired as to be liable to imposition, is a proposition extremely loose and indefinite. No person, much passed the very prime of life, has not suffered in some degree a deterioration in respect of some of the faculties, and no capacity, even the most perfect, is completely safe against the practice of extreme cunning and artifice. Upon the question of capacity or incapacity, the Court relies but little in question, it looks

SCOTLAND.

APPEAL FROM THE COURT OF SESSION.

SIR JOHN GORDON SINCLAIR, of } *Appellant.*
 Murkle, bart. - - - - - }

WILLIAM MANSON - - - - - *Respondent.*

A TENANT, by the terms of his lease, was bound to uphold and maintain the houses let in sufficient tenantable condition, during the lease, and to leave them so at his removal, subject to a special provision, that the timber in the sub-tenants houses should be valued at the commencement, and at the expiration of the tack; and that the out-going tenant should pay, or receive from the proprietor or in-coming tenant, the difference in value at those respective times.

The lease contained a further provision, that if the tenant should build an *additional* steading during the lease, the value thereof, at the expiration of the lease, to be ascertained by arbiters, at that time, should be allowed to him. Holding under this lease, the tenant pulled down the old buildings, and built a *new* steading.

It was decided on appeal, reversing in part the judgment of the Court below, that he was not authorized to pull down the old buildings without rebuilding or substituting others in their place, that the knowledge of such unauthorized acts without interference on the part of the landlord, did not conclude him on the principle of acquiescence, which is not applicable to such a case; but that the tenant is entitled to the value of so much of the new steading as ought to be considered as an additional steading, and not a substitution for the old buildings, subject to the provision in the lease, as to the timber in the sub-tenants houses. It was held also, that the tenant was entitled to be allowed for so much of the new buildings as consistently with the former finding he was entitled to have an allowance for, according to a valuation to be fixed at the time of removal, and not according to actual expenditure.

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IN the year 1785, the Respondent's father, obtained from the grandfather of the Appellant, a lease of the farm of Borrowstone, for the term of twenty-one years.

At the commencement of the lease, the buildings on the farm consisted of a servant's dwelling, a stable, a byre, two barns, a kiln, an oxen-house, and cot-houses, inhabited by sub-tenants.

The lease contained the following clause:—

“ The tenants shall keep, uphold, and maintain
“ the *whole* houses thereby set in *sufficient tenant-*
“ *able condition*, during this tack, and *leave them*
“ *so at their removal*, with this provision and de-
“ claration, that the timber in the several sub-
“ tenants houses shall now be appraised and valued,
“ at the sight of two neutral men, one to be chosen
“ by each party; and the like appraisement and
“ valuation shall be made at the issue of this tack;
“ and that the out-going tenant shall pay to or
“ receive from the proprietor, or in-coming tenant,
“ according to the *difference* of those valuations to
“ be made by neutral men as aforesaid.

A clause was also inserted in the lease, by which, in

“ one to be chosen by each party, whom the parties
“ shall be obliged to name, and whose determina-
“ tion shall be final.”

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The Respondent's father died in 1786, by which event this lease devolved upon the Respondent. Shortly after he came into possession, the Respondent pulled down the old buildings and erected on the land a new farm house, with offices.

These buildings were completed, without objection on the part of the landlord, two years after the commencement of the lease, and were occupied by the Respondent during the term.

At Whitsuntide, 1806, the Respondent quitted the premises on the expiration of his lease; and the land, together with these buildings, was let to another tenant, at a rent of 400 l.

Before quitting possession, the Respondent applied to the agent of the Appellant, who had succeeded to his grand-father's estate, and was then a minor, for the appointment of a person of skill, to concur with one to be named by the Respondent, to survey these buildings, and to make up a report of their value. These applications having been disregarded, the Respondent, on the 23d June 1806, made a notorial requisition by a written instrument, to the Appellant's manager, protesting, that in the event of failure within a time specified, judicial measures would be resorted to for such an appointment, and that the proprietor would be liable in the penalty stipulated in the lease, for this contravention.

No attention having been paid to this requisition by those who had the management of the Appel-

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lant's affairs, the Respondent presented a petition to the Judge Ordinary, the sheriff of Caithness, ' craving him to grant warrant to some fit person ' whom he should appoint, to concur with George ' Burn, architect, in the valuation of the houses and ' enclosures erected by the petitioner on the lands ' of Borrowstone and Lybster, during the currency ' of the before-mentioned lease, as the same stand ' at the present period, and to ordain them to re- ' port the same to him ; and after the said valuation ' has been carried into effect, to ordain the pro- ' prietor's agent to relieve the petitioner, after pay- ' ment and satisfaction has been made to him of ' the value of the said erections, in terms of the tack ' of the possession of the foresaid houses, and of all ' further risk or concern in the same.

Upon this application the sheriff pronounced the following deliverance :—" The sheriff-substitute " having considered the within petition, together " with the original lease therewith produced, grants " warrant for serving a copy thereof, and of this " interlocutor, upon Sir John Gordon Sinclair of " Murkle, Bart., and his tutors or curators, and

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ally on the defender, and his tutors and curators, who appeared, and opposed the petition. After some discussion, in which the Appellant contended that his obligation went no farther than the original cost of the buildings, valued at the time of removal, the sheriff-substitute granted warrant to a mason and a slater to inspect and value the masonry and slate-work, and to a wright and a house-carpenter to value the timber-work of the houses, and report. In consequence of this warrant the inspectors gave in a report, from which it appeared, that the value of the mason-work of the buildings, &c. was £.355 2 11 and of the carpenter-work - - 403 2 6 $\frac{1}{2}$

Total - £.758 5 5 $\frac{1}{2}$

and the valuator deponed, in presence of the sheriff, that “ the foresaid statement contains a just and true estimate of the several buildings therein mentioned, according to the usual rates of charging for such workmanship and materials in this county, and according to the best of their skill and judgment in those matters.”

The Respondent made a requisition upon the Appellant’s curators for payment of this sum, with interest from the term of Whitsunday 1806; and payment having been refused, he raised an action before the Court of Session, concluding for the above sum, “ together with 100 l., being the penalty stipulated by the lease for the contravention of any of its provisions, which the Appellant had incurred by refusing to name a person to inspect these buildings, and thus occasioning delay in the inspec-

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“ tion, during which the buildings were deteriorated,
 “ and also for the expense of the proceedings before
 “ the sheriff, in ascertaining the value of these
 “ houses, together with the expenses of process.”

Against this action defences were lodged for the Appellant and curators, objecting, *1mo*, That the amount of alleged repairs, &c. thus claimed exceed ten years rents of the farm: *2do*, That there is an action on the same ground, at the instance of the pursuer, depending before the sheriff of Caithness: *3tio*, That the pursuer owes arrears of the stipulated rents, which were left in his hands to compensate any just claims for repairs of buildings.

The case came before Lord Succoth, Ordinary, who sustained the defence of *lis alibi pendens*, by pronouncing the following interlocutor:—
 “ Having heard parties procurators on the libel and
 “ defences, in respect the sums now pursued for are
 “ the subject-matter of certain proceedings between
 “ the same parties, still in dependence before the
 “ Sheriff of Caithness, dismiss this action,” &c.

Against this judgment the Respondent represented that the proceedings before the Sheriff were

wards brought an advocacy, *ob contingentiam*, of the process before the Sheriff, which was conjoined with the ordinary action in the Court of Session.

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Lord Succoth accordingly recalled his interlocutor of the 15th February 1811, and appointed the case to be stated in memorials, upon considering which he pronounced the following interlocutor:—

“ Having considered the mutual memorials for the parties, and whole process, Finds, that it appears from the proof adduced before the sheriff of Caithness, that the steading upon the farm of Borrowstone, belonging to the defender, was both incomplete and in bad repair at the commencement of the lease granted in the year 1785, to the pursuer’s father; and that although the proofs were not satisfactory, the stipulations in the lease, upon which the present question depends, afford real evidence that this was the case: Finds, That, by an express clause in said lease, it was provided, that in case the tenant should build any additional steading on the said lands, he should have allowance of the value of the said steading at the issue of this tack: Finds, That no restriction is put upon the tenant, by this clause, as to the nature or extent of the steading which he might build upon the farm; and that it did not impose an obligation on the tenant to communicate the plans of the intended buildings to the landlord, or to give him formal intimation before commencing them: Finds, That the pursuer’s father did erect a new steading, consisting of a slated dwelling-

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“ house, and farm-offices, which must have taken
“ considerable time to erect ; and that no complaint
“ was made at the time by the landlord or his
“ factor that they were too large and not suitable to
“ the farm, nor any objection made until the pur-
“ suer came to demand the value of the same at the
“ expiry of the lease : Finds, That even, after the
“ cause came into this Court, the objection stated by
“ way of defence was not that they were too large
“ for the farm, but that the expense exceeded ten
“ years rents, (which does not seem to be true in
“ point of fact) : Finds, That although by a clause
“ in the lease the tenant was bound to keep the
“ whole houses upon the farm in sufficient tenant-
“ able condition, yet that, according to a fair and
“ rational construction of this clause, he was not
“ bound to maintain old houses after he had built
“ new ones sufficient for the farm ; and, therefore,
“ that the argument in defence, founded upon a sup-
“ posed breach of covenant in this respect, on the
“ part of the pursuer, is not well founded : Finds,
“ That as the interest of the money laid out in
“ building the new steading would be at least equal

“ liable in the sum of 758 *l.* 5 *s.* 5 $\frac{1}{4}$ *d.* being the
 “ amount of the valuations of the houses, with
 “ interest from the expiry of the lease, viz. Whit-
 “ sunday 1806; and finds the defender liable in the
 “ expense of the litigation since the interlocutor of
 “ 3d January 1813, conjoining the advocacy with
 “ the process previously depending in this Court.
 “ Lastly, as the claim for penalty and damages
 “ arising from the delay which took place in valuing
 “ the new steading, and which is said to have been
 “ owing to the opposition given by the defender,
 “ and also the amount of the ameliorations upon
 “ the houses occupied by the subtenants, are not
 “ sufficiently stated in the memorials, ordains parties
 “ to be heard at the bar upon these points; and also
 “ upon the expenses incurred in the Sheriff Court.”

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To this interlocutor the Lord Ordinary adhered,
 by refusing two representations; upon which the
 Appellant presented a petition to the First Division
 of the Court of Session, praying their Lordships “ to
 “ alter the interlocutor complained of, and to assoilzie
 “ the petitioner from the present action, and find
 “ him entitled to expenses.” In this petition, the
 Appellant rested his case, 1st, Upon the interpreta-
 tion of the clause in the lease regarding the expense
 of these buildings. 2^{dly}, Upon the proof adduced in
 the proceedings before the Sheriff, by which he al-
 leged it was made out, that the Respondent had
 failed to implement the obligations incumbent upon
 him with regard to the old houses on the farm,
 which he was bound to keep in a sufficient tenantable
 condition. 3^{dly}, Upon the allegation that the
 buildings which the Respondent had erected were

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upon an extravagant scale, and altogether unsuitable to such a farm.

This petition was appointed to be answered; and, thereafter, the First Division of the Court of Session, “ having resumed consideration of this “ petition, and advised the same, with the answers “ thereto, refuse the desire of the petition, and “ adhere to the interlocutor reclaimed against : “ And, in the mean time, decern against the peti- “ tioner for the sum of 700 l. Sterling, which sum “ they ordain to be paid to the Respondent, on or “ before the term of Candlemas next ; and, if not “ then paid, decern also for the expense of extract, “ and allow the interim-decree to be then ex- “ tracted.”

The Respondent having also brought under the review of the First Division, that part of the interlocutor of Lord Succoth, which found him liable in the expenses of process, prior to the 3d January 1813, their Lordships “ so far alter the interlocu- “ tor reclaimed against, as to find neither party “ entitled to any expenses which were incurred prior ” to that date.

For the Appellants, *The Attorney-General*, and
Mr. W. Adam.

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The determinations of the Lord Ordinary and the Court against the Appellant proceeded upon a misinterpretation or misconception of the real nature of the agreement between the predecessors of the parties, contained in the lease, founded on by the tenant in support of his claim. The Court of Session held that the bargain was, that the tenant should have it in his power to build a separate and entirely new suit of farm-offices, under the name of an additional steading, on the lands let, without reference to the accommodation which was previously on the farm; whereas the tenant was expressly bound to maintain and uphold the old existing steading, and even to leave it at his removal in sufficient tenantable condition, and therefore any new buildings which the tenant was to be entitled to demand compensation for from the landlord, were merely such as were necessary or proper additional buildings, over and above the other houses, which were to be at all events upheld. The case of *Ducat* * cited for the Respondent, is not applicable in its circumstances, and the authority of that case may be doubted.

The judgments under review are erroneous, in so far as they gave effect to a plea of the Respondent, founded on the alleged state of the houses in 1785, as appearing from a proof taken in the Sheriff's Court at an early stage of the present litigation. This evidence, it was said, showed the old houses to be

* Post, p. 33.

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so ruinous and worthless as to lead to a presumption that the parties had it in contemplation to allow the erection of an entire new suite of buildings. But parol proof is inadmissible to explain the lease ; and the reasoning is not only irrelevant, and contrary to the express provisions of the lease, but proceeds on a view of the proof altogether inaccurate.

According to the judgments of the Court of Session the Appellant's claim to the value of the steading (or similar buildings), which the tenant was bound to uphold, was disallowed ; but as the new buildings were erected partly with the materials of the old, the Appellant, by the decision against him for the full value of the whole new steading, has been obliged to pay a price for his own property.

The decree against the Appellant is untenable, as the additional buildings were unsuitable to the farm, as possessed by the Respondent and his predecessor.

The Respondent pleaded, that the Appellant was bound to pay the estimated value of the buildings in this case, because he or his predecessors and their factors acquiesced in the erection. This is also one

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Upon these grounds, if the tenant was found entitled to the value of any buildings at all, it ought to have been limited to such as had been fair and *bona fide* "additions" to the former steading on the farm; and even these ought to have been valued, not at the price of labour and materials in 1807, but at the actual rate of outlay when the buildings were erected.

For the Respondents, *Mr. J. P. Grant*, and
Mr. H. Stephen.

The lease, in terms of which the Respondent possessed his farm, expressly bears, That in case the tenant should build "any additional steading on the said lands," he should have "allowance of the value of such steading, at the issue of this tack, from the said Sir John Sinclair, and his foresaids, according to a valuation to be put thereon, at the term of removing, by two neutral men as arbiters, one to be chosen by each party, whom the parties shall be obliged to name, and whose determination shall be final."

In the case of *Ducat against the Countess of Aboyne**, the plea of the landlord was much stronger than in the present case. For in that case, the claim of the tenant for the expense of erecting a new dwelling-house was sustained, although the lease did not contain any express clause authorizing a new house to be built; and although the proprietor, before the house was begun, distinctly signified

* Fac. Coll. 14 May 1803.

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to the tenant that he was determined not to make any allowance for such an expenditure. The lease contained a clause binding the tenant to leave the houses on the farm, which he was to take under inventory, in a sufficient and habitable condition at his removal, and "if the said houses shall be then found to have been ameliorated, the said Charles Ducat shall have allowance therefor from the said Countess of Aboyne." After the lease had subsisted some years, Ducat, instead of ameliorating the old house, pulled it down, and built an entire new one; and before commencing this building, a protest was taken, that the proprietor should not be liable in the expense. Ducat, notwithstanding, went on with the work, and at the expiry of the lease brought an action for the difference between the estimated value of the new house which had been erected, and the old houses upon the farm, and in this action he prevailed, although the proprietor pleaded that the clause in the lease applied only to meliorations on the houses existing on the farm at the commencement of the lease; and although the tenant had been distinctly informed

been erected by the Respondent, were worth the sum for which decree has been given.

There being no limitation in the lease as to the amount of the sum to be expended in these farm-houses, and the Appellant's predecessor having made no objection at the time to the nature or extent of the accommodation, the Appellant is not entitled, at the end of the lease, to derive the whole benefit of buildings erected at the Respondent's expense, without making a fair allowance for their value.

After erecting a complete and substantial farm-steading sufficient for all the purposes of the farm, the Respondent could not reasonably be considered as being any longer under the obligation of keeping up the old houses, which were thus rendered unnecessary.

Even if the Respondent had been still under the obligation of keeping up the old houses, after he built a new farm-steading, the Appellant has not shown either that the Respondent allowed those old houses to fall into any other disrepair than what was necessarily occasioned by lapse of time, or that he ever required the Respondent to keep up those houses.

Any supposed deficiency in the implement of such an obligation can never afford a legal defence against a clear and liquid claim upon the Appellant for the estimated value of these houses.

The buildings erected by the Respondent, the value of which was not equal to two years rent obtained for this farm at the expiry of the lease, did not contain any superfluous accommodation, or any

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thing more in this respect than is usually allowed to a tenant paying a rent of 400*l.* per annum.

The Appellant, as proprietor of the estate, derived an advantage from these buildings equivalent to the sum he has been decerned to pay, and he is not entitled to this benefit at the expense of the Respondent.

[In the course of the argument the following observations were made.]

9th Feb.

The Lord Chancellor :—The principle of acquiescence is undoubted. But if I covenanted with my tenant, and he with me, that he should keep the buildings in repair, and he pleases, instead of repairing, to rebuild, can it be said, (unless there are special circumstances in the contract,) that because I stand by and permit him to rebuild I must pay for the alteration? Is there any case to such effect?

Lord Redesdale :—The decision in Ducat's case did not go so far as this. For there the judgment was only for the difference between the value of the new and the old buildings, so far as the substitu-

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according to the contract. But has he done so? If he has acted, not under the contract, but according to his own discretion, he must bear the legal consequences. If it is a mere substitution, he is entitled to no allowance. To the value of additions he is entitled under the contract, but not for mere substitution, according to the judgment of the interlocutor. What is substitution, and what addition may be the subject of inquiry.

The Lord Chancellor, after stating the lease and obligations, proceeded to make the following observations:—Among the provisions of this lease, it is material to observe the respective times when the valuations are to be made, with respect to the timbers of the sub-tenants houses, and the additional stead-
ing. The timber is to be valued at the commencement and the issue of the tack, and if the tenant builds an *additional* steading, he is to have the value of *such* steading at the issue of the tack, according to a valuation then to be made.

It might be difficult to collect the meaning, or to put a satisfactory construction upon these clauses of obligation, taken singly; but looking at them altogether they tend to explain each other. What precisely was intended by the parties, in the provision for building an additional steading, is not, perhaps, with certainty to be ascertained. But instead of the addition contemplated or expressed, new edifices have been erected. Upon this state of things the question arises how the valuation is to be made between landlord and tenant in a case apparently not

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anticipated *. The interlocutor of the Lord Ordinary, affirmed by the Court of Session, finds the Appellant liable in the whole amount of the valuation of the new buildings; but the obligations of the lease require that the old buildings should be kept and left in repair, subject to certain valuations of timber, and the tenant is at liberty to build an additional steading, not to pull down the old one and replace it by new buildings. Under these circumstances it is impossible at the end of the tack to allow the tenant the whole value of the new steading. He cannot claim more than he would have been entitled to demand if the obligations had been observed as to keeping the old buildings in repair and making the addition of the new steading. The allowance by the Court of Session of the whole value of the new steading is too much.

Under the circumstances of this case it will be proper for the House to embody some special findings in their order †, and remit the case to the Court below for re-consideration.

Lord Redesdale :—According to the covenants in this case the tenant was bound to keep the old buildings in repair, and to build an additional steading, not to pull down the old one and replace it by new buildings. Under these circumstances it is impossible at the end of the tack to allow the tenant the whole value of the new steading. He cannot claim more than he would have been entitled to demand if the obligations had been observed as to keeping the old buildings in repair and making the addition of the new steading. The allowance by the Court of Session of the whole value of the new steading is too much.

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the covenants applicable to the old became obligatory as to the new buildings. That part of the clauses of obligation, which relates to the valuation of the timber of the sub-tenants houses, seems to explain what is otherwise difficult of construction.

The timbers before the commencement of the lease were probably in a state of decay, and it was foreseen that it would be necessary to substitute new timbers: it was therefore provided, that in case of such substitution the value of the timber at the entry should be estimated and compared with the value at the expiration of the lease, and that landlord or tenant should pay or receive the difference, according to the result of such valuation. This provision shows that the tenant was to have allowance only for ameliorations. The landlord is not to be deprived of the old buildings, and to pay the full value of the new ones without compensation for the repairs which the tenant was bound to make.

Die Mercurii, 21st February 1821.

The Lords, &c. find, That according to the terms of the lease the tenant was bound to keep, uphold and maintain the whole houses set in sufficient tenantable condition during the tack, and to leave them so at his removal, subject to the particular provision respecting the timber on the sub-tenants houses; and that the tenant was not authorized by any provision in the lease to pull down the old buildings without rebuilding the same, or substituting other buildings instead thereof; but inasmuch as the tenant was authorized by the terms of the lease to build an additional steading, and has built an entire new steading, and pulled down the old buildings, he is entitled to the value of so much of such new steading as ought to be considered as an additional steading, and not a substitu-

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tion for the old buildings; subject nevertheless to the particular provision in the lease touching the timber in the sub-tenants houses: Further find, that according to the terms of the lease the Respondent is entitled to be allowed for so much of such new buildings as, consistently with the former finding, he is entitled to have an allowance for, according to a valuation to be put thereon at the time of removal, and not according to the actual expenditure in making such new buildings: And it is ordered, that, with these findings, the cause be remitted back to the Court of Session in Scotland, to do therein as is just and consistent with such findings.

SCOTLAND.

FROM THE COURT OF TEINDS.

SIR HENRY HAY MAKDOUGALL,
 of *Makerston*, in the County of
Roxburgh, baronet - - - - } *Appellant*;

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The Reverend DAVID HOGARTH,
 Minister of the Parish of *Ma-*
kerston - - - - - } *Respondent*.

A DECREE having been made under the Authority of the High Commission Court in 1635, valuing the teinds of various lands therein described, and now belonging to the Appellant, an extract of that decree had been produced by the ancestor of the Appellant, in a process of augmentation of the minister's stipend in the year 1720; when it appeared, or was assumed, without objection on the part of the Heritor, that the word ascertaining the number of chalders at which the teinds of his lands were valued, had been obliterated by a fold in the paper, (or possibly left in blank;) and in that process consequently the lands were held as unvalued. Upon a similar process, in 1799, it was found by the Court that the valuation of the lands in question, in the decree of 1635, is not legible, and that, although the decree appears to have been intended as a valuation of the whole parish, and the lands belonging to the Appellant are set forth in the decree, the valuation annexed to them is *totally obliterated*. The same course was pursued, and with a similar result, in a process for augmentation in 1805. In 1814, upon a new process for augmentation, the Appellant as heritor having by his first defence admitted that the word appeared to be obliterated, afterwards produced evidence to show that the word supposed to be effaced was either *ten* or *twa*, and that no other word could have occupied the vacant space; and reports to that effect were made by men of skill and experience, in decyphering ancient and decayed instruments, to whom the inquiry was referred.

The original decree had perished among the records of the Teind Court, consumed by fire in the reign of Queen

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Anne. The extract had remained in the possession of the Appellant and his ancestors.

Held, that the extract not being an original instrument in the possession of the law, but of the party claiming a right under it, whose duty it was to have supplied the defect under the provisions of the statute of Anne (1707), as to the records of the Teind Court destroyed by fire, conjectural evidence could not be admitted to supply the word supposed to be effaced.

Whether under the provision of the Scotch statute 1707, for "making up the tenor of decreets, whereof the extracts are amissing and the registers lost in the fire," the Lords of Session were empowered to receive evidence and supply the defects of an extract not missing, but imperfect and unavailable, on account of the obliteration of material words.—*Quære*.

Whether a defect by loss, erasure, or obliteration, in an instrument of gift or contract, if the proceeding to supply the loss, &c. were instituted recently after the accident, or the discovery of the defective state of the instrument, and where the party is not estopped by his own admission, and by former adjudications.—*Quære, semb. affirm.*

Where the substance of a question has been adjudged by former decisions, upon the admission or acquiescence of the party, costs are given upon the affirmance of a subsequent judgment on appeal.

THE question in this Appeal arose out of a process raised by the Respondent for an augmentation of his stipend as minister of Melrose. The following

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to the Appellant. In this extract the numeral, ascertaining the number of chalders at which the lands were valued, had been effaced by the folding of the paper, or (possibly) had been from some cause originally left in blank. The extract, as produced in the process in the Court below, which is the subject of the present Appeal, appeared as follows:—

“ They find and declare the just worth and yeirlie
 “ avall of the lands underwritten, pertening to the
 “ persones above and efter nominat, heritable, lyand
 “ within the said parochin of M’Kerston, to be in
 “ personage teind, the quantities of victuell under-
 “ written of the qualities efter spect., ilk ane of the
 “ saidis heritors as follows : To witt, the landis, town,
 “ and maynis of M’Kairstoune, &c. with their
 “ pendicles and pertinentis perteining heritable to
 “ Sir W. M’Dougell, to be worth in personage
 “ teind chalderis victual, tua part cheritet
 “ beir, and thrid pairt heiper ait-meill, all of the
 “ old mett and measour of Jedburgh. The lands of
 “ Stodrig, and four husband landis in M’Kerstoun,
 “ &c. to be worth in personage teind tua chal-
 “ deris half chalder victual, tua pairt cheritet
 “ beir, and third pairt heipet ait-meill of the said
 “ auld mett and measour of Jedburgh. The
 “ thrie husband landis of M’Kerstoun, pertening
 “ heritable to W. M’Dougell to be worth in
 “ personage teind nyne bollis victuell, tua part
 “ cheritet beir, and third pairt heipit ait meill of
 “ the said auld mett and measour of Jedburgh;
 “ and the saidis Lordis decernis and ordainis
 “ the quantities of victuel, above written, of the
 “ qualities above spect, to stand, continue, and
 “ indure, and to be repute and haldin, in all

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“ tyme coming, the just worth and yeirlie availl of
 “ the landis above mentionat, in personage teind,
 “ *communibus annis*; becaus the said persewar
 “ compierand be the said John Dunlop, advocat,
 “ his pror. producit the said rental of the personage
 “ teindis of the landis above written; and the
 “ saides Robert, Erle of Roxburgh, titular, Sir W.
 “ M'Dougell, &c. compeirand personallie, and be
 “ thair pror. as said is, consentit and agreit to the said
 “ rental producit, and wer content to be halden as
 “ confest thairupon: Thairfore, the saidis Lordis
 “ fand, and declarit, decernit, and ordainit, in man-
 “ ner foresaid; and, also, the saidis commissioneris
 “ findis and declairis, that the landis of Charterhouse
 “ pertening to, &c. extending three husband landis
 “ lyand, &c. ar worth, and may pay yeirlie of
 “ constant rent in personage teind, the number of
 “ aucht bollis victuell, tua pairt cheritet bier, and
 “ thrid pairt heipit ait meill of the said auld met,
 “ and measour of Jedburgh; and the saidis Lord
 “ decernis and ordainis the samyne to stand and con-
 “ tinew, and to be repute and halden the just worth
 “ and yeirly avail of the saidis landis in personage
 “ teind, *communibus annis*, in all tyme coming.”

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respective lands. Upon this occasion, as appears from the records of the Teind Court, Henry MacDougal, of Makerston, the ancestor of the Appellant, produced, in presence of the said Lords, ane
 “decree of valuation, obtained before the said
 “lords and others of the commission, for surrenders
 “and teinds, upon the 15th day of July, 1635
 “years; whereby they found the just worth and
 “constantly yearly avail of the lands under-written,
 “pertaining to the persons after mentioned, lying
 “within the said parish of Makerston, to be in
 “parsonage tiend the quantities of victuals under-
 “written, of the qualities after specified, viz. *the*
 “*lands, town, and mains of Makerston, Luntounlaw,*
 “*Muirdean, Nethermains, Manorhill, with their*
 “*pendicles and pertinents pertaining, to Sir William*
 “*MacDougal, of Makerston, knight, to be worth*
 “*of parsonage tiends, — chalders victual, two*
 “*part cheritet bear, ane third part heapit oatmeal,*
 “all of the old mett and measour of Jedburgh,” &c.
 The decree then proceeds to specify the lands of Stodrig, and four husband lands in Makerston, which are valued at two chalders, eight bolls; the three husband lands of Makerston, which are valued at nine bolls, and the lands of Charterhouse, which are valued at eight bolls.

In making up a scheme of the teinds of the parish on this process, the lands of Stodrig and others, where the decree of valuation was legible, were valued at the quantities of grain there specified; but in regard to the first parcel of lands mentioned in the decree, viz. the lands of mains of Makerston, &c. where the number of chalders of grain

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corresponding to the teinds, had either originally been left blank, or had been accidentally obliterated, the teinds were held to be unvalued, and the stipend modified to the minister of the parish was allocated accordingly.

The stipend continued to be paid in terms of the decree of modification and locality of 1720, down to the year 1799, when the predecessor of the Respondent raised a new process of augmentation* and locality. Upon this occasion a rental was made up in the usual way, which was approved of

* According to the present forms, a process of augmentation is conducted thus:—The process is brought by the minister, as pursuer, against the proprietors of lands, the titular or lay impropiator of the teinds, and all others having right to teinds within the parish. The minister produces a rental of the parish, which is made up generally of the rents actually paid at the time. The first step to the process is to adjust that rental agreeably to the rights of parties. Those proprietors who have decrees of valuation of their teinds produce those decrees, or refer to them, if upon record; and they are rentalled agreeably to such valuations. Those having no decrees of valuation are rentalled agreeably to the *rents actually* paid at the commencement of the process, one fifth part of which is taken as the teind. After the rental is adjusted the minister exhibits the

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by the Court; and in enumerating the lands belonging to the Appellant, it is stated that by decret of valuation, dated July 16, 1635, the lands after specified “were valued as under.” The rental then specifies the lands of Stodrig, and four husband lands of Makerston, which are valued at two chalders, eight bolls; the three husband lands of Makerston, which are valued at nine bolls; and the lands of Charterhouse, which are valued at eight bolls. It then proceeds thus, “*These are all the lands of which the valuation in the decret above mentioned is legible.* The decret, however, seems to have been intended as a valuation of the whole parish, and it specifies, besides the above three articles, the lands, town, and mains of Makerston, Luntlaw, Muirdean, Nethermains, and Manorhill, pertaining to Sir William MacDougal, of Makerston, knight; *but the valuation annexed to these lands in the decret is totally obliterated.*” The rental then enumerates the different farms belonging to the Appellant, including as well those of which the valuations are especially mentioned in the decree, as those of which the valuation was illegible or omitted; and after the enumeration concludes thus,—“Of all the lands, the decree of valuation is effectual only quoad Stodrig, seven husband lands of Makerston, and Charterhouse.” Upon this rental the heritors were held as confessed. It was approved of by the Lord Eskgrove, ordinary, and afterwards by the Court; and upon the proven rental the decree of augmentation was pronounced upon the 5th of June 1799.

The Respondent’s predecessor instituted a second process of augmentation in 1805, which was ulti-

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mately dismissed, upon the ground of there not having been any such change of circumstances within so short an interval as to authorize a second augmentation ; but the cause was prepared for decision in the usual way. A scheme of the rental was made up in common form ; and in this scheme, (upon which the heritors, and among others the Appellant, Sir Henry Hay Macdougall, were held as confessed, and which was afterwards approved of by the Court,) the same statement is given as to the illegibility of the decree of valuation 1635, except in so far as regards the lands specially enumerated. The rental was accordingly made up in the same terms as the previous rental of 1799.

In the year 1814 the Respondent raised a process of augmentation and locality, in which the Court held the heritors as confessed upon the rental produced by the Respondent, and remitted to Lord Reston, Ordinary, to prepare the cause.

The Appellant, who is proprietor of the whole parish, with the exception of a small farm belonging to the Duke of Roxburgh, gave in objections to the rental exhibited by the Respondent, in which, after specifying the valuation of the three different

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The Respondent lodged answers to these objections, which it is not necessary to state, as the Appellant, in his replies, abandoned the grounds of objection to the rental which he originally brought forward, and insisted that this decree (extract) must be held as a good and effectual decree of valuation of the teinds of the lands called Mains of Makerston, &c. as at *ten chalders*, two thirds bear, and one third part oatmeal.

The Respondent maintained that this part of the decree was altogether illegible; that the amount of valued teind might be taken just as well at any other supposed quantity as at *ten chalders*; and that it was impossible to supply this omission or obliteration in the decree.

The decree (extract) was produced to the Lord Ordinary at the bar. It appeared that there had been a fold in the document, which was written upon a single sheet; and a hole had been worn through the paper at the place where the word expressing the number should have occurred. The Lord Ordinary made a remit to Mr. John Dillon, writer in Edinburgh, and to Mr. James Miller, one of the teind clerks, who were accustomed to examine old writings, “to examine the decree, “and to depone as to their opinion of the disputed “word therein.”

In consequence of this remit, Messrs. Dillon and Miller made a report on oath upon the 1st of June 1815, in the following terms, as expressed by Mr. Dillon, and concurred in by Mr. Miller: “That “he has, along with the said Mr. James Miller, read “over and examined the decreet of valuation of

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“ teinds, shown to him, and marked as relative
“ hereto ; and particularly that part thereof which
“ specifies the valuation of the town and mains of
“ Makerston, Luntounlaw, Muirdean, Nether Mains,
“ Manorhill, with their pendicles and pertinents :
“ that the word which expresses the number of
“ chalders payable out of these lands has become
“ illegible, owing to a small part of the paper on
“ which it was written being wasted away, occa-
“ sioned, as appears to the Deponent, by the fold :
“ That part of the first letter of the said number of
“ chalders is visible ; and, from comparison with the
“ other parts of the decret, the deponent conceives
“ that letter has been a capital T, as what remains
“ of it, being the top stroke, agrees with the like
“ stroke of other capital T’s occurring on the same
“ decret : That the space which the remainder of
“ the word has occupied could not well contain
“ more than two letters, and it is most probable the
“ word was either twa or ten ; but in the present
“ state of the paper the deponent cannot take upon
“ himself to say, from any thing that now appears
“ on the face of the paper, which of these two

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“ is gone where the most part of the word was writ-
 “ ten, and all that can possibly be made appear is
 “ only a small part of the letters, which may have
 “ reached that part of the paper which remains, and
 “ of which the deponent thinks some trace remains,
 “ but at present cannot be certain. And further
 “ depones, that having, in presence of the commis-
 “ sioner, applied infusion of galls to the word in
 “ question, nothing appears that enables him to say,
 “ with greater certainty than he has above deponed
 “ to, what that word originally was. And being
 “ interrogated, depones, that he does not think the
 “ word in question was either three or threttie, be-
 “ cause he can observe no trace of the appearance of
 “ the down stroke of the letter *h*, which letter,
 “ throughout the whole Decreet, at least when it is
 “ medial, is almost constantly written with a down
 “ stroke coming below the line: That the only
 “ instance in said paper where an *h* appears without
 “ the down stroke, is when the word begins with *th*,
 “ in which case, the letters *th* are made in a sort of
 “ capitals, taking up a considerable space, and, by
 “ measurement with compasses, the space so taken
 “ up for these two letters alone would be more than
 “ the room left for it in the writing in question.
 “ Interrogated if it be his opinion that said word
 “ could be a contraction for *twenty*, depones, that he
 “ does not think it probable; for this reason, that it
 “ is not common in decreets of valuation of teinds to
 “ contract the numbers; and more especially, that,
 “ in the writing in question, which is written in
 “ a fair and uniform hand, there are throughout not
 “ a single contraction of a number, and therefore

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“it is not likely that the doubtful word would be
 “the only exception. And on again examining the
 “Decreet, the deponent does not find in it any word
 “contracted besides M^c in Mackairston.”

June 9, 1815. The Lord Ordinary afterwards took the case to Report, and appointed the parties to state their respective pleas in memorials. These memorials were accordingly submitted to the judge, who, upon the motion of the Appellant, allowed an additional report to be made by Messrs. Miller and Dillon; and also a report by Thomas Thomson, Esq. advocate, as to the state of this writing. The additional report by Messrs. Miller and Dillon was made on the 13th of February 1816, in the following terms:
 “We have again carefully examined the decree of
 “valuation in question; and it appears that the
 “solution of galls has had a further operation, more
 “than it had when we formerly examined it, in so
 “far as the colour of the ink, where it was applied, is
 “now deeper; and, particularly, we can now discern
 “what appears to be the remains of a stroke, which
 “probably constituted part of the last letter of the word
 “which occupied the place where the paper is worn

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“ of a decree of valuation of the teinds of that parish,
 “ dated July 15, 1635, produced in that process,
 “ and more particularly that part of the writing
 “ which is partly worn away, and which has been the
 “ subject of dispute between the parties ; and I am
 “ of opinion that the word in question could not
 “ have consisted of more than three letters ; that
 “ the first of these letters evidently enough has been
 “ a capital *T* ; that the next letter is entirely obli-
 “ terated, or rather, the paper on which it has been
 “ written is entirely worn away ; that the last letter
 “ is very nearly in the same state, but that there
 “ does appear a small portion of it, which I am
 “ inclined to think from its form is more likely to
 “ have been the last limb of the letter *n* than of the
 “ letter *a* ; or any other letter that can be supposed
 “ to have ended any numerical word that could have
 “ stood in this place ; and, *without presuming to*
 “ *state it as any thing more than a probability*, I
 “ am of opinion that the word is more likely to have
 “ been *ten* than *twa* or *tua*, the only two numerical
 “ words which I can conceive it possible to have
 “ stood in this part of the writing.”

Upon these reports the Lord Ordinary made
 avizandum with the cause to the court.

The memorials were afterwards considered by the
 Court, with the aid of these additional reports, when
 the following interlocutor was pronounced : “ The
 “ Lords having advised the memorials for the parties,
 “ and the minute for the pursuer, they sustain the
 “ objections made for the pursuer to the decret of
 “ valuation produced and founded on by the defender,

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“ Sir H. H. MacDougal of Makerston, and remit
“ to the Lord Ordinary to prepare a scheme of the
“ rental accordingly, and to report.”

Against this interlocutor the Appellant presented a reclaiming petition, in which he insisted, that the reports which had been obtained from the persons who had been appointed to examine this old writing afforded sufficient evidence that the obliterated word was either *two* or *ten*; that he was willing to take the numeral which was more favourable for the Respondent, and to hold the teinds of the lands in question as having been valued at *ten* chalders; and he therefore maintained that the decree should be so interpreted.

The Respondent having put in an answer, the Court, upon advising the petition and answer, adhered to their former interlocutor.

Against these judgments the appeal was presented.

For the Appellant, *The Attorney-General*, and
Mr. Wetherell.

Although part of the word in the extract of the



permitted such a defect to be supplied by any means whereby the will of the testator might be ascertained*. In such cases, where instruments were lost or destroyed, recourse might be had to parol testimony †.

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The law of Scotland is the same as to instruments of gift or contract which have been lost, destroyed or effaced. In all which cases the Court allows the tenor to be proved ‡.

Here the proof is supplied by probable conjecture. According to the report of the inspectors no word could have occupied the obliterated space but ten or twa, and the Appellant is willing to concede to the Respondent the insertion of the word most for his advantage. By inspecting the valuation of the lands in the parish, as it appears in the cess-books, it is ascertained that the proportion of value assignable to the lands of Makerston, as compared with the other lands in the parish, and their proportion of teinds remaining legible in the decree, gives exactly ten chalders as the teind of Makerston. So that the conjecture of the reporters is fortified, if not rendered certain, by this calculation.

In former proceedings on this same question it has been taken for granted, that the word is illegible; but there has been no decision to that effect, nor any admission sufficient to exclude the Appellant

* Voet. Lib. 28, tit. 4, s. 2.

† Mathæus de Probationibus, c. 3, s. 131.

‡ *Earl of March v. Montgomery*, 19 July 1743, a personal bond; *Nimmo v. Sinclair*, 26 July 1771, a heritable bond; *Inglis v. Hay*, 26 June 1712, *Cunningham v. Greenlees*, 9 June 1674, marriage contracts.

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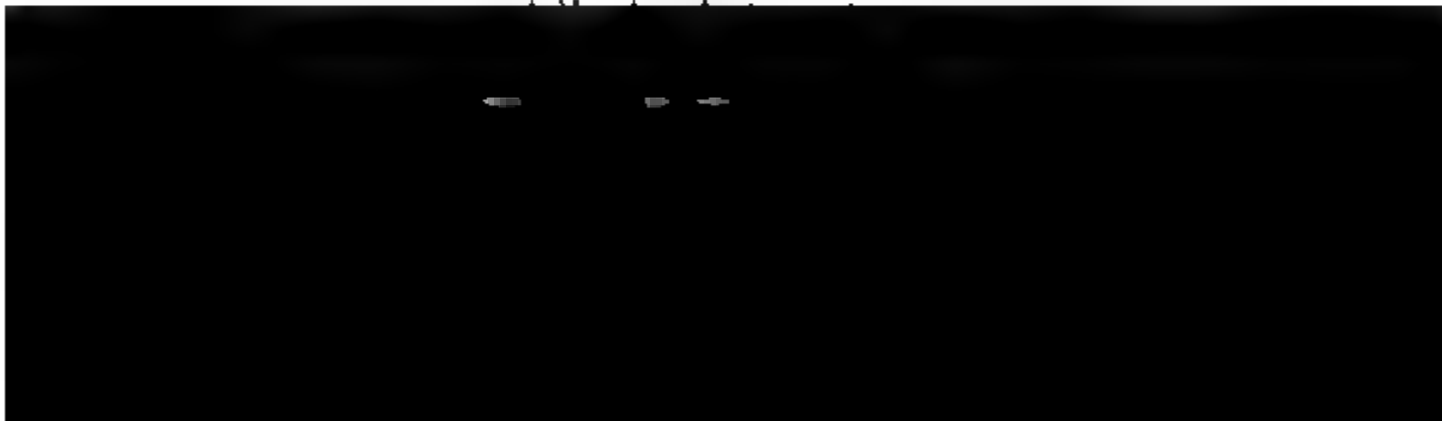
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from now showing that the word is legible. The presumption arising from the experiments and examination, detailed in the reports, is sufficient to infer that certainty or strong probability, to which the text-writers refer *.

For the Respondent, *Mr. Brougham*, and *Mr. W. Adam*.

The burthen of proof lies upon the Appellant. It is for him to produce a perfect document to ascertain the value of his teinds. The defect of this indispensable word cannot be supplied by conjectural evidence.

The referees commence their report by admitting that the word is illegible. The question is thereby concluded. They cannot make it legible by any *hypothesis*, or any chain of *hypotheses*. The ground of their conjecture from fragments of lines and measuring of spaces is fanciful. The instrument has been in the possession of the heritors, and who knows how and when the marks now forming the basis of this conjecture came, or were put upon the paper. As to spaces, the writers of manuscript vary



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As to the argument drawn from the comparison of the teinds with the cess, and the real rent, it is entirely against the Appellant. In the comparison of the cess he selects the lands of Charter House, which happen to answer his purpose. If he had tried a comparison with the other lands comprised in the decree, he would have found, that the result was adverse to his conjecture. So it appears also upon a comparison of the real rents with the teinds, which gives twenty or thirty chalders as the probable valuation of the teinds.

There is no precedent for supplying such a defect in a record or instrument by conjectural evidence. It is an accidental loss which must fall on the party who claims under it * ; *Bayley v. Garford*.

The Lord Chancellor :—The question upon this appeal is, whether the blank in the decree ought to have been considered as filled up with the word “*ten* :” Whether, upon inspection, or upon the result of the evidence produced in the cause, the Court of Teinds should have found that the instrument was perfect, and acted upon it as demonstrating the number of chalders of victual, which originally stood in the decree.

The instrument now produced is not the original record. It is an extract which comes out of the

* March, 125, 2 Show. 29. S. C. Three were bound in a bond, jointly and severally; the seals of two were eaten by rats. As March reports the case, the Court were *inclined* that the bond was void against all. Shower cites it as *adjudged* that the bond was void.

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possession of the party, who now insists that it ought to have the effect of a complete record. He therefore, or those under whom he claims, were bound to preserve the document in such a state as to manifest the right with reasonable certainty. The act which was passed in Scotland in 1707, for the valuation of teinds, reciting the loss of the registers of the Court of Teinds by fire, provides, "that *authentic* extracts from these records may be brought in," (the authenticity of this extract is not disputed, the question turns upon the contents,) "and being presented to the Lords, be recorded in a particular register, and that the said extracts so brought in be kept by the Lord Clerk Register, &c. and be held as valid and authentic, as the principal warrants themselves, if the same were yet extant; and the Lord Register, and his deputed, are ordained to give a new extract, *gratis*, to every person that shall give in an old extract, &c.; and extracts from these new records shall make the like faith in judgment, and out-with the same as the extracts from the old registers of the commission were wont to do before they were burnt."

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“ make up the tenor of such Decrets in manner
“ above mentioned, whereof extracts are amissing,
“ and the registers lost in the said fire.” If this
clause is to be considered, as providing only for the
case of extracts from the burnt registers, which had
been lost, it would be inapplicable to the case in
discussion. But if such a construction may be put
upon the words of the clause, as to authorize the
Court to make up the tenor of the decree, where a
word is missing or obliterated, then an application
might have been made to the Court of Teinds, under
this act of Parliament. It appears that in the pro-
cess in 1720, this extract was produced, and con-
sidered to be unintelligible as to the lands in question.

The same thing has happened in two subsequent
proceedings; and it is now to be considered, whether
the proofs, in support of the instrument produced,
furnish such a degree of certainty as to authorize a
reversal of the judgment.

You cannot apply to the case of a document in the
custody of a party the same principle of decision, as
if the question related to a record in the keeping of
the law. Considering, moreover, what has taken
place with respect to this extract since the year
1720, it would be too hazardous to decide, upon the
evidence now produced, that the obliterated word in
the extract was “ Ten ;” and as the Court of Teinds
has repeatedly held this extract to be unintelligible,
the judgment ought to be affirmed with costs.

Lord Redesdale :—The evidence produced in the
cause is evidence to prove that some teinds of the

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BOGARTIE. parish were valued, but is no proof as to the teinds in question. The valuation of those teinds might have been left in blank in the original decree; there is nothing to prove the contrary. In that case the decree had no operation as to these teinds. The act 1707 provided a remedy for the loss of the records of valuation; and it was the duty of all persons, who had an interest in preserving the records, to proceed without delay to establish their rights.

The persons, who in 1707 were entitled to the lands of the Appellant, ought to have brought their extract into the Court of Teinds, to have it recorded as evidence of their rights, if it was then perfect; or if any part of the extract was effaced by accident, to have supplied the defect by evidence. Such evidence then probably might have been adduced. Now it is difficult, if not impossible, to produce, and dangerous to admit, such evidence. If the right ever existed, it has been lost by the negligence of those who failed to claim it. A century has elapsed since the claim ought to have been presented; and this neglect furnishes a strong ground to presume, that they were incapable in

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could not be supplied, which, in effect, they have admitted then, and in subsequent proceedings.

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Die Veneris, 23 Feb. 1821.

Ordered, and adjudged, That the said petition and appeal be and the same is hereby dismissed this House; and that the interlocutor therein complained of be affirmed, with 200*l.* costs.

IRELAND.

FROM THE COURT OF EXCHEQUER.

Sir ROBERT LYNCH BLOSSE, bart.
 and FRANCIS LYNCH BLOSSE,
 his eldest Son, an Infant, by the
 said Sir ROBERT LYNCH BLOSSE,
 his Father, next Friend, and
 Guardian - - - - - } *Appellants.*

The Right Hon. JOHN LORD
 CLANMORRIS and GEORGE
 RICHARDS, Esq. - - - - - } *Respondents.*

LANDS being settled by *H.* upon the sons of *R.* successively in tail male, with divers remainders over, and the ultimate reversion to *H.* and his heirs. *H.* is attainted of high treason, and afterwards *B.* the issue in tail, being in possession under the limitations of the settlement, suffers a recovery. Whether it is effectual to bar the reversion vested in the Crown by the attainder.—*Quare.*

A TITLE, depending upon a recovery suffered by a Tenant in tail of lands, the reversion of which had vested in

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use of the first and other sons of Robert Lynch, severally and successively in tail male, with divers remainders over, with the ultimate limitation to the right heirs of Sir Henry Lynch.

After the date of this deed Sir Henry Lynch was attainted of high treason.

In the year 1779 Sir Henry Lynch Blosse became seised of the lands under the limitations of the deed, as tenant in tail male; and in Michaelmas Term 1779 suffered a common recovery of the lands to the use of himself in fee.

By his will, bearing date the 18th day of February 1788, Sir Henry Lynch Blosse gave certain legacies and annuities, to be raised by sale or mortgage of his lands in Ireland; and, subject thereto, he gave all his real estates in Ireland to the use of his nephew, the Appellant Sir Robert Lynch Blosse, for life, with divers remainders over.

Sir Henry Lynch Blosse died in February 1788, leaving the Appellant, Sir Robert Lynch Blosse, a minor.

During the minority of Sir Robert Lynch Blosse several of the incumbrances affecting the lands were paid off by his guardian, out of the savings of the estates; and Sir Robert Lynch Blosse himself, after he came of age, paid off more of the incumbrances with his own money. The securities were assigned to the Respondent George Richards, in trust for the Appellant Sir Robert Lynch Blosse.

In 1811 the Appellant, Sir Robert Lynch Blosse filed a bill in the Court of Chancery in Ireland, in the name of George Richards, against himself, and the Appellant, Francis Lynch Blosse,

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his eldest son and others, praying an account of the debts and legacies of Sir Henry Lynch Blosse, and that the same might be paid, or in default thereof, that a sale might be had of a competent part of the estates, for payment of the debts and legacies, pursuant to the trusts of the will.

In consequence of proceedings under the decree made in the cause, Brabazon Browne, in trust for the Respondent, John Lord Clanmorris, became the purchaser of several denominations of the lands. On the 17th of November 1815, by an order made in the cause, it was referred to the Master to inquire and report, whether a good title could be made out to the purchaser, and whether any and what act was necessary for that purpose.

On the 7th of December 1815 the Master reported that a good title in fee-simple could be made to the lands; and that the only acts necessary were to procure a certain judgment affecting the lands for 60,000*l.* to be assigned to a trustee to protect Lord Clanmorris, and the other purchasers. An objection was taken to this report on the part of the Respondent, Lord Clanmorris, upon the

Blosse, and that therefore the said title was defective.

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On the 3d of February 1816 an application was made to the Master of the Rolls, *to set aside the report**, which was ordered, on the grounds of objection before stated.

The Appellants acquiesced in the last-mentioned order, and on the 10th of February, 1816, by an order made, on the application of the Appellants, it was referred to the Master in the cause, to inquire and report whether any and what acts were necessary to be done to make out a good and sufficient title; the Appellant, Sir Robert Lynch Blosse, undertaking to procure such report within a week; and if any acts were necessary to be done, it was further ordered that the said Master should report within what period of time the same ought to be completed, if reasonable diligence should be used, the solicitor for the Respondent undertaking to attend before the Master on the first summons.

In pursuance of this order the Master made his report on the 19th day of February, 1816, that a good and sufficient title could be made out to the Respondent, *in case* the commissioners for executing the office of Lord High Treasurer of Ireland, by and with the consent of the chief governor of Ireland, should conceive themselves warranted to grant the reversion in fee of the said lands under and by virtue of the powers vested in them by the Act of the forty-sixth of George the Third, chap. 123†;

* See the observation of Lord Redesdale, p. 71.

† An Act to amend several Acts for the Sale of (Crown Rents, &c., and) certain Lands forfeited and undisposed of in Ireland.

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and if that could not be obtained, that a good title to the said lands could be made out to the Respondent, by means of a private Act of Parliament, to be obtained by the Appellants; and the Master further reported, that such grant or private Act of Parliament might be procured with reasonable diligence in the course of the then session of Parliament; and he further reported, that the Appellants, procuring a certain judgment for 60,000 *l.* to be assigned to a trustee to protect the said purchase, would secure the purchaser against any outstanding judgments that might remain unsatisfied.

This report was confirmed, and afterwards the Appellants appealed from the order of the 3d day of February, 1816, to the Lord Chancellor, who, by an order dated the 12th day of March 1816, refused the Appellants application, and affirmed the order.

The Appeal to the House of Lords was against the orders of the 3d of February, and the 12th of March 1816.

Against the order confirming the report of the 19th of February, 1816, there was no appeal.

The reversion, while it belonged to the original reversioner before the attainder, was subject to the right of the tenant in tail, to be destroyed by a recovery.

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Lord Redesdale :—Is there any Irish statute similar to the English statute 34 Hen. 8, saving the rights of the Crown ?

For the Appellants :—There is not*. That statute has been held by construction to apply only to estates-tail created by the Crown†. The principle of that construction applies equally to remainders and reversions not flowing out of the Crown. A reversion vesting in the Crown by grant, subject to a condition, may be barred by the recovery of the tenant of a particular estate‡. Where the estate vests in the Crown by forfeiture, the same principle applies||.

* See Mr. Butler's note (323) to Co. Litt. 372, b.

† Co. Litt. 372, b.

‡ Chomley's case, Rep. 2. 52, & Moor, 342. In Coke's Rep. the case is put thus in one of the points resolved.

“ A man makes a gift in tail, the remainder in fee; he in remainder grants his remainder to another for life; the remainder to the queen in fee, upon condition, *ut supra*, tenant in tail suffers a common recovery; if this recovery shall bar the estate of tenant for life in remainder, and the condition also, is the question. And it was resolved, that the recovery doth bar, not only the estate-tail, but also the estate for life, although the remainder of the fee was in the queen; for it is out of the stat. of 34 H. 8, c. 26, because the estate-tail was not of the queen's gift,” &c. fo. 52. “ And by operation of law, the estate for life being defeated, the remainder to the Queen, which depends upon it, shall be defeated also,” fo. 53.

|| See *Nicholles v. Nicholles*, Plowden, 481. 486; and *Walsingham's Case*, Id. 552, 3.

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Lord Redesdale :—Have you considered the effect of the statute *de donis*^{*}, as to reversions in the Crown; how far the principles on which the Courts have permitted parties to suffer recoveries of estates-tail, and reversions upon them, affect the Crown? It must be argued, on authority; there is no intelligible principle †.

For the Appellant.—The effect of the statute *de donis* ought to be the same as to the King and private persons. Can it be contended that a reversion vesting in the King by the felony of the reversioner, or upon a conveyance by the most remote remainder-man, would deprive the tenant in tail of his right to bar the reversion by a recovery?

How does a recovery operate? By enlarging the estate-tail into a fee. If therefore the recovery bar the estate-tail, it ought to bar the remainders over, and reversions also, of which the fee-simple is composed. A recovery puts the estate-tail under the statute, in the same situation as the alienation by the donee in tail after issue born put the gift in

* 13 Ed. 1. In *Magdalen College, Case*, 11 Rep. 72, &c.

tail before the statute *de donis*. The decision in the great case upon the validity and effect of recoveries, rests expressly upon this principle, that “he who claims by another cannot be in a better estate of right than he through whom he claims*.”

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For the Respondents, the *Attorney General*,
and *Mr. Horne*.

It is fully established, that a remainder or reversion vested in the Crown, and expectant on an estate-tail, cannot be barred by a common recovery suffered by the tenant in tail †. If that point were doubtful, yet, according to the rules of a Court of Equity, a purchaser is not compelled to accept a title subject to a serious doubt as to its validity.

The Lord Chancellor, after stating the facts and

* *Hunt v. Gately*, Moor, 154. See also Piggott, 85, where he says, it is *verata questio* how far at common law a remainder vested in the King was divested by recovery and discontinuance.

In Wiseman's Case, 2 Rep. 15, which was a conveyance in remainder to the Crown, expressed to be for the purpose of creating a perpetuity, the fourth of the resolutions upon which the judgment in favour of the recovery is founded, is that “by such secret limitations of the remainder to the Queen, purchasers are deceived, and the tenant in tail in possession deprived of the power which the law giveth him to cut off the remainder, &c.” See the fifth resolution.

See also Nevil's Case, 7 Rep. 121; Mary Portington's Case, 10 Rep. 35; Lord Chesterfield's Case, Hardres, 409, Piggott, 88; *Martin v. Strahan* 1 Wilson, 73.

† Shepherd's Touchstone, 42, (Preston's edition); Lord Nottingham's MSS., Hargrave and Butler, Co. Litt. note (323) to Co. Litt. 372, b; Brooke's Abr. Assur. pl. 6; Taile, pl. 41; 2 Rolle's Ab. Com. Rec. (A); Lutwych, 848, 9; Vin. Abr. Com. Rec. (z); Com. Dig. Estates, B. 31; see also the stat. 26 Hen. 8, c. 53; 13 Hen. 8, c. 20; 34 & 35 Hen. 8, c. 20; 27 Eliz. c. 1; 11 Wm. 3, c. 2; 1 Anne, stat. 2, c. 21; 46 Geo. 3, c. 123.

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proceedings in the case, observed, that there was no appeal against the order confirming the last report; which might create a difficulty as to further proceedings, if the judgment upon the other orders should be reversed.

The question was, whether a reversion vested in the Crown by forfeiture, and not by original grant, could be barred by a recovery: whether the doctrine of law upon that point could be stated to be so clearly against the Crown that a purchaser ought to be compelled to take an estate with such a title. That the law as to estates-tail, under the stat. 34th Hen. VIII, was clear and settled; but not so with respect to such a reversion as now was in question. That he could not advise the House, sitting as a court of equity in appeal, to hold a purchaser to the contract in a case, where it could not be stated as a matter free from doubt, whether the reversion had been barred by the recovery; and as the purchaser had been brought into Court upon a doubtful title, he ought to be discharged with costs.

Lord Redesdale:—That a reversion vested in the Crown, but not reserved upon a gift by the Crown,

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every other case. The case in Rolle's Abridgment * is decisive on the point. Pigott †, in one passage, treats it as a disputable point at common law. Cruise ‡ seems to understand the law on this subject, as it is laid down in Rolle, and refers to the practice of divesting the reversion of the Crown by act of parliament, to enable the tenant in tail to make an effectual recovery. The practice is important as evidence of the state of the law. General opinion is certainly against the title. In this case it is not necessary to come to any precise decision on the point. It is sufficient, on the question now before the House, if the law be doubtful. A purchaser has a right to require a marketable title; and this title, it must be admitted, rests on a point of law which at least is doubtful. This being so, the purchaser who has been obliged to keep his money in readiness, and deprived of the opportunity of vesting it in another purchase, has been hardly used, and is entitled to his costs. The proceeding in the Court below, of setting aside the report, is extraordinary practice.

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It appearing to the Lords that the title offered to the Respondent, Lord Clanmorris, at the date of the Report of the 7th December 1815, was not such a title as a purchaser was bound to accept under the circumstances stated, &c.; It is therefore ordered and adjudged; that the said petition and appeal be dismissed, and that the said orders therein complained of, be affirmed with 250*l.* costs.

* Rol. 394, l. 2.

† Recov. 85, see the passage ante, p. 69, note. ‡ Recov.

SCOTLAND.

COURT OF SESSION, SECOND DIVISION.

JOHN DINGWALL - - - - - *Appellant*;
The Reverend GEORGE GARDINER, *Respondent*.

The Scotch statute of the 1st Parl. of Charles II. sess. 3, c. 21, provides that where competent manses are not already built, the heritors, &c. shall build competent manses to their ministers, the expenses thereof not exceeding one thousand pounds (83 *l.* 6 *s.* 8 *d.* sterling), and not being beneath five hundred marks; and where competent manses are already built, ordains that the heritors shall relieve the minister of all charges for repairs, declaring that the manses, being once built and repaired, &c. by the heritors, they shall be upholden by the incumbent ministers during their possession, or by the heritors out of the stipend in time of vacancy.

Up to the year 1760 the sum allowed for building manses, upon litigation in the Courts Ecclesiastical and of Session, had not exceeded the amount specified in the statutes, except in cases where the heritors consented. But from the year 1760, it had been the practice in both courts, without the consent of the heritors, to grant much larger sums.

In 1814, the Respondent applied to the Presbytery to ordain the heritors to *build* a new manse, which was decreed accordingly, upon an estimate of the Respondent amounting to 1211 *l.* The question being

the clause as to the building of manses; and with this finding the judgment below was affirmed.

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Whether a custom, beginning in 1760, can abrogate or control a Scotch Act of Parliament, *quære?*

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The defender, by his pleadings in the first instance, having taken issue upon the sum necessary to build a *competent* manse, and not having then insisted upon the limitation of the statute (*semb.*) had waved the objection arising out of the statute; but having finally, in a reclaiming petition, insisted upon that objection, which the Court referred to the Lord Ordinary as a point not before argued, and the pursuer not having objected or appealed against the interlocutor, by which this reference was made, the right to insist upon the objection was restored.

BY the Scotch act of the first parliament of Car. II. 3d sess. c. 21, it is recited and provided as follows:

“ And because, notwithstanding of divers acts of
 “ parliament made before, diverse ministers are not
 “ yet sufficiently provided with manses and glebes,
 “ and others do not get their manses free at their
 “ entry, therefore our Sovereign Lord, with advice
 “ foresaid, statutes and ordains, That *where compe-*
 “ *tent manses are not already built*, the heritors of
 “ the parish, at the sight of the bishop of the dio-
 “ cese, or such ministers as he shall appoint, with
 “ two or three of the most knowing and discreet
 “ men of the parish, build competent manses to their
 “ ministers, the expenses thereof not exceeding one
 “ thousand pounds, and not being beneath five hun-
 “ dred merks: and *where competent manses are*
 “ *already built*, ordains the heritors of the parish
 “ to relieve the minister and his executors of all
 “ costs, charges and expenses for repairing the *fore-*
 “ *said* manses: Declaring hereby, that the manses

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*"being once built and repaired, and the building
"and repairing satisfied and paid by the heritors in
"manner foresaid, the said manses shall thereafter
"be upholden by the incumbent ministers during
"their possession, and by the heritors in time of
"vacancy, out of the readiest of the vacant sti-
"pend."*

In the year 1814 the Respondent, who is minister of the parish of Aberdour in Aberdeenshire, made an application to the Presbytery of Deer, within which the parish lies, setting forth that his manse was in a ruinous condition, and praying that it might be inspected, and that the heritors of the parish might be ordained to build a new one; and at the same time he produced a plan of the proposed house and offices, with an estimate of the expense, amounting to 1,200*l*.

The Appellant, who is proprietor of the greater part of the parish, objected to the plan as extravagant, stating, that *although the presbytery could not legally subject the heritors to the payment of any sum beyond what was mentioned in the act of parliament, yet, considering how inadequate that*

to whom the matter had been referred, the Presbytery gave their decree against the heritors for 1,214*l.* 14*s.* 10*d.* sterling.

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The Appellant complained of the decree to the Court of Session by bill of suspension, which was passed; and the matter came to be discussed before the Lord Pitmilley as Ordinary.

On the 16th of February the Lord Ordinary made avizandum to himself, &c.; and on the 24th lodged a note in process, by which he states, that “having considered the plans in process, there is no question about repairing or adding to a manse already built. It seems admitted that a new manse and offices must be erected, and the point to be determined is, whether the plan produced by the minister should be adopted, &c.”

On the 1st March 1815, the Lord Ordinary pronounced this interlocutor: “Having heard parties procurators, before answer, remits to Mr. Laing, architect, to inspect the plans, specifications, and estimates produced, to consider the objections, to each which have been stated in the extracted decree of the Presbytery, and to report.

Mr. Laing accordingly made a report on the merits of the several plans, in which he stated, that the sums allowed by the Presbytery exceeded any he had ever heard of being allowed for building a manse and offices.

The Lord Ordinary made avizandum to himself with the report, and thereafter pronounced the following interlocutor:

“The Lord Ordinary having considered the report of Mr. Laing, and heard Mr. Laing along with

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“ the counsel of the parties thereon, of new remits
“ to Mr. Laing with instructions to adopt either of
“ the plans in process, or to make such alterations
“ as he shall think proper ; or, if preferable, to make
“ a new plan ; *the expense of whichever plan to be*
“ *adopted not to exceed 1000 l. sterling, exclusive of*
“ *the old materials.*”

Against this interlocutor the Appellant having offered a representation, it was refused by the Lord Ordinary.

In all the discussions before the presbytery and the Lord Ordinary, the question turned upon the amount of the sum to be expended in the erection of the manse, &c., the Appellant admitting that it was reasonable, and had been the practice, *with the consent* of the heritors, to exceed the sum specified in the statute as the maximum to be expended in erecting a manse, and consenting to allow 800 l. for the purpose ; but at the same time referring generally to the objection arising under the words of the statute.

Against the final interlocutor of the Lord Ordinary the Appellant presented his petition to the whole

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respect that the plea stated in the prayer thereof, that the expense of the manse and offices leviable from the heritors should not exceed 1,000 *l.* Scots, had not been discussed before the Lord Ordinary.

The Respondent having given in to the Lord Ordinary an answer, the following interlocutor was pronounced :

“ The Lord Ordinary having considered this
“ petition, with the answers thereto, and whole pro-
“ cess, finds, that by the act 1663, c. 21, the
“ heritors of parishes are ordered to build competent
“ manses for their ministers, and that this express
“ provision of the statute, under the authority of
“ which alone new manses can be built, could not
“ in the present day be complied with if the expense
“ of the building were to be limited to the sums of
“ money mentioned in the act of parliament, which,
“ with a view to the expense of building at the date
“ of the act, was fixed at 1,000 *l.* Scots, as the maxi-
“ mum, and five hundred merks as the minimum :
“ Finds, that the clause in the statute which pro-
“ vides that where manses are already built, the
“ heritors shall relieve the minister of the expense
“ of repairing them, does not limit the amount, and
“ that these repairs therefore must frequently in the
“ present day exceed the expense of building a new
“ manse as fixed in the act, although it must
“ evidently have been the intention and understand-
“ ing of the act that the expense of repairing an old
“ manse should be much less than the expense of
“ building a new one, and that it should be for the
“ interest of the heritors to repair rather than to
“ build, while the reverse would be the case if the

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" construction put upon the statute by the petition-
 " ers were adopted: Finds, that the usage to this
 " effect is not only uniform and long established, but
 " was sanctioned by the Court in the case referred to
 " by the Respondent of the minister of Inverury*,
 " after the point was litigated by one of the heritors:
 " Refuses the desire of the petition, and adheres to
 " the interlocutor reclaimed against."

Against this interlocutor the Appellant presented a reclaiming petition to the whole Court, which was refused. And a second petition against the former interlocutor, praying an alteration, and that the Court would suspend the letters *simpliciter*, and find that the sum mentioned in the statute could not be legally exceeded, was also refused.

For the Appellants, *Mr. C. Warren*, and *Mr. J. P. Grant*.

On the part of the Appellant, it was contended, that the act 1663 was a temporary measure; that the act was not applicable to the case of rebuilding when the manse *once* built has become ruinous, or to a second repair at the expense of the heritors

the statute (1000 *l.* Scots) as the maximum for building*.

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That the inadequacy of the sum which the statute allows might afford a ground for application to the legislature for enlarging it, but could afford no reason for the church courts usurping a power of assessing the subject at their discretion.

When a sum was limited, beyond which the heritors could not be assessed, for building a new manse, and at the same time they were subjected to the expense of repairs without an express limitation, the reasonable interpretation of the statute is, that the cost of repairs could not go beyond the cost of building. If, immediately after the passing of the act, the Presbytery or the Bishop had decreed the heritors to pay a sum beyond the 1,000 *l.* for repairing an old manse, while necessarily confessing that they were limited to that sum for building one entirely new, it seems impossible that the courts of law could have given their sanction to such a decree; and Lord Stair accordingly considers the limitation to apply equally to repairs and building.

The Appellant is not called upon to show that the statute is consistent. He admits that there ought to be a new law on the subject, to correspond with the present state of society.

The legislature, when limiting the expense of the original building, could not mean that the expense of repairing or rebuilding should be unlimited.

The Appellant denies that any practice can justify

* See Stair's Institute, b. 2, tit. 6, sec. 19. Mackenzie, b. 1, tit. 5, sec. 12. Bankton, b. 2, tit. 8, sec. 121. Erskine, b. 2, tit. 10, sec. 55, 56.

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the disregarding a clear act of parliament in such a case as the present. If the heritors were under an obligation to provide competent or suitable manse by the common law, or independent of the act 1663, it might be argued that that act had become obsolete, or had been departed from, and that therefore the common-law obligation might be resorted to. But the common law is here out of the question, there being no such obligation but by force of the statute. If that statute is obsolete, there is no authority to assess the heritors in any sum whatever.

It is true that Presbyteries have taken upon them to exceed the sum limited by the act of parliament, and that the Court of Session has lent its sanction to their doing so, it being felt that the sum mentioned in the statute had been extremely inadequate; but those interested were considered as tacitly consenting, till very lately, that it has been done avowedly and against their will. The industry of the Respondent or his counsel has discovered one solitary case, occurring in the year 1760, which the interlocutor alludes to, where one of the heritors did plead the act of parliament unreasonably, the sum

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The judgment in the present case seems inconsistent in principle with that given by the Court in the case of the minister of Dunbar*. The statute on which the present question arises also enacts, that the minister besides his glebe shall have pasture land for a horse and two cows; and if there be no pasture land in the parish as distinguished from arable, there shall be paid to the minister in lieu of it the sum of 20*l.* Scots. In the parish of Dunbar there was found to be no pasture land in the sense of the statute; and the minister arguing, as in the present case, that the sum specified in the act was totally inadequate, and instancing that the Court had in practice disregarded the limitation with regard to manse, prayed that they would do the same, by awarding compensation in money in lieu of pasture, computing what would be sufficient, according to the modern rate, to maintain the cattle specified in the act: but the Court, holding themselves bound to follow the direction of the statute, declared that they had no power to go beyond its strict letter.

For the Respondents, *The Attorney General* and *Mr. H. Stephen*.

On behalf of the Respondents the argument was to the following effect:—

At the Reformation the clergy were deprived of a part only of their revenues; and, therefore, at first a certain part only of the burden of building churches was imposed upon laymen. By the act of Privy Council 1563, it was provided that *two parts* of the

* 15 May 1814.

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expense thereof be made by the parishioners, and a *third part* by the *parson*, who then was not a stipendiary minister, such as all the clergy of Scotland now are, but a parson in the proper sense of word, *viz.* a beneficiary having a right to the tithes of his parish.

With regard to manses, by an act of Parliament (1563, c. 72,) it was provided that ministers serving at kirks should have "the principal manse of the parson or vicar;" or, if the manse and glebe was set in feu or in tack, it was enacted that "*ane reasonable and sufficient house be bigged to them, beside the kirk.*"

After episcopacy was restored in the reign of James VI, it was thought just that the old law should be revived, throwing the burden of repairing and upholding manses upon the beneficed clergy; and accordingly the act 1612, c. 8, was passed, which speaks of "archbishops, bishops, *and others, ecclesiastical persons;*" but it is plain from the purposes of the act, as well as from the period when it was framed, that beneficed persons only were meant; and hence it is denominated in the rubrick, "An

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Scotland became stipendiaries ; and having become stipendiaries, it was thought just that the burden of building and repairing manses should be thrown entirely upon heritors. This was specially provided by the rescinded acts 1644, c. 31, and 1649, c. 45 ; and the enactment in the latter statute was, after the Restoration, revived almost verbatim by the act 1663, c. 21.

The Appellant has argued that the question at issue is not whether the burden of manses should be again transferred to the clergy, but to what extent it shall be imposed upon a particular class of the laity ; and has maintained that it was by the titulars or lords of erection, and not by the heritors at large, that the spoils of the church were acquired. That the heritors at large did not obtain the whole spoils of the church is very true ; but in acquiring the privilege of valuing and purchasing their teinds, heritors certainly shared in a very important part of those spoils. But the point at issue must be regulated by the statutes, according to the interpretation which has been put upon them by long usage, and by express decisions.

The limitation of the statute 1663 was only meant to apply to those parishes which had no manses built at the date of the statute, and which were to be immediately built. The sum was fixed upon as the maximum in those cases, because at that period a good manse might then have built for the sum of 1,000*l.* Scots.

In that part of the enactment which devolves upon heritors the burden of repairing manses there is no limitation of any sum. Heritors are required to

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relieve ministers "*of all cost, charges and expenses for repairing of the foresaids manses :*" Under the authority of this part of the statute, the courts in Scotland have a power of ordering a manse to be repaired to an indefinite extent ; and can it be supposed that the legislature could mean that more than 1,000 *l.* Scots might be given for repairing a manse, and yet that no more than this sum should be allowed where it was necessary wholly to rebuild it ? Even speaking of manses which were to be rebuilt, the legislature says that they shall be "*competent manses,*" that is, they should be *suitable* to the respective benefices ; whereby it virtually enacted that the sum to be allowed must vary with the expense of the building ; and it follows that as soon as the supposed sum became inadequate, from a rise in the materials for building, or a fall in the value of money, the courts who had jurisdiction in this matter were entitled to increase the estimated value according to such a change of circumstances.

In interpreting acts of Parliament, all writers on the law of Scotland agree that a certain latitude is given to judges*.

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be adopted which accords best with the real object of the legislature.

But this strict construction of the act is contrary to the practice both of the church judicatories and of the courts of law, and the express judgments of the Court of Session.

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So long as a *competent* manse could be built for 1,000*l.* Scots, this sum was not exceeded. For nearly a century after the date of the act 1663, there was little diminution in the value of money, or rise in the price of materials employed in building manses. This appears from the price of grain remaining stationary till about the middle of the last century, 100*l.* Scots the chalder being the conversion price of grain at the date of the act 1663; and this was not merely the Court conversion, but seems to have been much about the real price during the first half of last century.

From the date of the act 1663, downward, to about 1750, it appears that 1,000*l.* Scots continued to be the sum usually allowed by the Court for building a manse; and, until that period, competent manses could generally be built for that sum, partly in consequence of the low price of labour and materials, and partly from the very humble buildings which were then allowed to the clergy; for not only were these very small, both in the number and in the dimensions of the rooms, but the walls were frequently built with clay instead of lime. About the year 1750, the expense of building appears to have risen; and as other ranks of people began to live in better houses, it was natural that the clergy

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should look also for some melioration in their habitations. At first, however, it appears the Court did not venture to exceed the 1,000*l.* Scots, unless there was a consent of the heritors; but in the year 1760, the power of the Court to exceed that sum was fully discussed, and terminated in a judgment in favour of the minister.

The question occurred in the case of the minister of Inverury*. This decision was probably the origin of the practice which has prevailed so long both in the ecclesiastical judicatories, and in the Court of Session in Scotland, of awarding to clergymen such sum as would give them competent manse, without regard to the pecuniary *maximum* mentioned in the act 1663.

It is a maxim of law universally acknowledged, that "as one statute may be explained by another, it may also be explained by the uniform practice of the community, for which reason custom is said *to be the surest interpreter of law* †."

It is an express rule of Scotch law, that a statute may be entirely deviated from and lose its power by custom. This is laid down by Lord Stair ‡. "In

*“ of whatever antiquity, remain ever in force till
 “ they be repealed, which occasions to them many
 “ sad debates (public and private) upon old
 “ forgotten statutes.”*

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The same doctrine is laid down by Lord Bankton*. He says, our municipal law “ further consists of our
 “ statutes or acts of Parliament ; to those, no doubt,
 “ former laws or ancient customs must yield, but
 “ with this limitation, that laws here, before the
 “ Union, relating to private rights, are not to be
 “ altered by the British Parliament, but for the
 “ evident utility of the subjects within Scotland.
 “ Many of our old statutes have run in disuetude,
 “ a contrary usage for a long course of time
 “ acquiesced to by the law-givers, being a tacit
 “ abrogation of them ; and this is expressly declared
 “ to be the law with us by our old statute.”

In like manner Erskine † states, that “ as a pos-
 “ terior statute may repeal or derogate from a prior,
 “ so a posterior custom may repeal or derogate
 “ from a prior statute, even though that prior
 “ statute should contain a clause forbidding all
 “ usages that might tend to weaken it, for the con-
 “ trary immemorial custom sufficiently presumes the
 “ will of the community to alter the law in all its
 “ clauses, and particularly in that which was in-
 “ tended to secure it against alteration ; and this
 “ presumed will of the people operates as strongly
 “ as their express declaration.”

• Although, therefore, the Appellant could make

* B. 1, tit. 1, s. 60.

† B. 1, tit. 1, s. 45.

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out that the act of Parliament was once imperative with respect to the sum to be allowed for building manses, yet the Respondent, in virtue of these authorities, would be entitled to argue that this part of the act has lost its force by contrary usage.

Supposing the words of the statute to be doubtful, they have received an interpretation by express decisions and long-continued practice. *The Duke of Hamilton v. Scott**.

As to the acts respecting bail in criminal matters, to which the act in question has been assimilated,

* The question there was, whether a minister, whose manse had been once repaired, was entitled to demand farther repairs from the heritors? The heritors founded upon a clause in the same act of Parliament, 1663, c. 21, in support of their argument, that after a manse had been once repaired, the burden of upholding it should fall upon the incumbent. The minister (Mr. Scott) pleaded, that although this argument received some countenance from the words of the act of Parliament, yet it was quite contrary to the spirit of the enactment, and that a different construction had been put upon the statute for a long period. It was said by the Lord Chancellor, in moving the judgment, that he "agreed that the legislature meant, by the act of 1663, that when the manses should have been once

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there is a wide difference between the cases. The act of 1701 gave no power to magistrates to exact "competent" bail; but *fixes precise sums*, which no authority short of that of the legislature could exceed. Criminal statutes must in all cases be strictly interpreted. The act 1701, with respect to bail, has not been deviated from in relation to the sum specified, either by the decisions of the Court or by a contrary practice.

In the cases before the House of Lords, respecting second augmentations of ministers stipends, the argument of the heritors was founded upon the special words of the decreets arbitral of Charles I, and of the relative acts of Parliament; and the answer made on the part of the clergy was, that supposing the argument to be well-founded, it was overturned by the invariable practice of the Court in granting first augmentations after the Union; and that if the Court had power to augment a stipend once which had been modified during the time of Charles I, it had power to augment more than once. It was upon this ground principally that the judgments by the House of Lords were founded*. The rule of the Court of Session in refusing to grant second augmentations was objected to as a recent practice, which could not be put in competition with the prior inveterate usage. The issue of these cases, therefore, so far from being favourable to the argument of the Appellant, is directly the reverse; for the judgments were founded entirely upon the force of usage to explain express laws of a doubtful nature, or

* See the cases of Kirkden, Tingwall, and Prestonkirk, D. P.

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rather to explain laws which were generally thought to be unfavourable *in the very words*.

In the case of Dunbar the question was, whether a minister was entitled to ask more than 20*l.* Scots, (the sum fixed by the act 1663,) in lieu of a grass-glebe where land could not be given. The claim of the minister rested upon very different grounds from those on which the present claim stands : 1st, The act of Parliament does not provide, as it does with respect to manses, that ministers shall in all cases have "competent" grass glebes ; 2d. The practice of the Court with respect to grass-glebes was precisely the opposite way from what it had been in relation to manses, for from the date in 1663 down to 1814, the date of the Dunbar case, the Court had not in any one case given more than 20*l.* Scots in lieu of a grass-glebe.

The objection now pleaded by the Appellant was discussed in the House of Lords, and repelled in a case decided in the year 1786*.

* This was a case respecting the manse of the parish of Lethindy. The old manse had been ruinous, and a new one became necessary. The Presbytery pronounced a judgment

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The Lord Chancellor :—This is a question of great importance to the heritors and clergy of Scot-

found that it might be executed for 195*l.* 10*s.* sterling, which was about 15*l.* less than the sum allowed by the Presbytery.

Mr. Mercer then carried the cause by appeal to the House of Lords, and he maintained four “reasons” of appeal, the first of which is stated thus in his appeal case: “Because by
“the act of Parliament above recited, passed in 1663, it is
“enacted, that the heritors shall provide and build manses for
“the ministers, and that the expense thereof shall not exceed
“1,000*l.* Scots, and not beneath 500 marks; and that this is
“a positive statute which must be binding in all cases, and
“over which the Court of Session neither have nor ought to
“have any discretionary power whatsoever, either to exceed
“the *maximum*, or to go below the *minimum*; but in the pre-
“sent case, the Court of Session have decreed a sum for re-
“building this manse, greatly more than double the *maximum*
“allowed by law, three fourths of which falls upon the Appel-
“lant in respect of his property within the parish; and there-
“fore he has a right to object, and does contend, *that the sum*
“*to be allowed for the purpose ought not to exceed one thou-*
“*sand pounds Scots, the maximum allowed by the statute above*
“*mentioned.*”

To this reason of appeal the following answer is made in the appeal case for the minister :—“This plea made its appearance
“for the first time in the appeal; it was not stated in the
“Presbytery, or in the Court of Session, and consequently
“is inadmissible here. It will not be believed that such a
“bar to the proceedings would have been omitted, had not
“the Appellant and his counsel been satisfied of its being
“groundless. It is well and long established, that the act
“1663, in circumscribing the expense to 83*l.* 6*s.* 8*d.* sterling,
“*respected only manses then immediately to be built in parishes*
“*where there had been none before*: so it says. The sum
“mentioned must have been reckoned sufficient in those days;
“*but the legislature could not be so absurd as to suppose that it*
“*would be sufficient in all future times.* And accordingly, in
“the next clause in the statute respecting reparation of manses

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land; and it will be unfortunate if the main question in the cause cannot be decided upon this appeal.

The principle upon which the act of parliament is to be construed is the first question of difficulty. Looking at the admissions in the bill of suspension, it might have been difficult to contend that this point made upon the construction of the act had not been waived. But the Respondent seems to have restored the right to make that defence, by not objecting to the interlocutor of the Court of the 12th June 1815, which remitted the cause to the Lord Ordinary on that point. So it seems that question is still open. Whether all the findings of the Lord Ordinary can be adopted in case of affirmance, it is difficult to say. It will be necessary to look with care at the statute, to determine what ought to be the construction as applied to circumstances.

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The Lord Chancellor :—As we find it to be necessary to alter some of the declarations of the interlocutor of the Court of Session, the proposal of the minutes of judgment in this case must be postponed. The interlocutor states several proposi-

case. Experience confirms the truth of that which is apparent in theory, that it is inconvenient and dangerous to incorporate in judgment doctrines of law which are not called for by the circumstances of the case. It will be proposed, on moving the judgment, to narrow the finding of the interlocutor; but to sustain the judgment in effect, with some observations on the question of costs*.

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The Lords, &c. find, That this case ought to be considered as falling within the meaning of that clause in the statute 1663, c. 21, which relates to the repairing of manses, and not within the clause which relates to the building of manses, where manses had not been then already built: And it is ordered and adjudged, that with this finding, the said interlocutors of the 11th March 1815, and the 11th May 1815, and so much of the interlocutor of the 10th January 1816, as refuses the desire of the petition of the Appellant, and adheres to the interlocutor reclaimed against, be affirmed: And it is further ordered and adjudged, That the said several other interlocutors be affirmed, with 100*l.* costs.

* On the subject of the effect of desuetude and practice, as applied to acts of parliament in Scotland, see the observations of Eldon, Ch., in the *D. of Hamilton v. Scott*, 13 July 1813, MSS. and 1 Dow, 403.

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The following account of the case of Inverury, mentioned in the text, p. 86, is taken from the records of the Kirk session of that parish, where the proceedings are preserved:—

The Presbytery of the bounds having given a decree to the minister for a new manse in the usual form, letters of horning were raised upon this decree, and a charge was given to the heritors. Of this charge, one of the heritors, Mr. Leith, of Black-hall, presented a bill of suspension. His reasons of suspension were, 1st, That the manse was appointed to be built upon some grounds belonging to the Earl of Kintore, which was possessed under a strict entail: 2d, That the manse, according to the plan approved of by the Presbytery, was too large in point of dimensions, and would exceed the sum of 1,000*l.* Scots, which was the *maximum* allowed by the act 1663. The reasons for suspension came to be discussed before Lord Coalston, Ordinary, and the heritor then “judicially offered at the bar to pay his proportion of 1,000*l.* Scots, *which is the maximum directed by the law for building a manse*; and agreed that “the chargers might dispose of that in such a manner as they thought proper, and this besides the materials of the old manse; *but further he apprehended, under the circumstances in which the case stood, he could not in equity, nor in law, be desired to go.*”

This offer, judicially made, “was refused by Mr. Simpson (the minister) and the Presbytery, who contended,

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“ he said, was necessary for building the new manse, which
 “ had been approved of by the Presbytery, *amounting to*
 “ *123l. 6s. 2d. sterling, besides the materials of the old*
 “ *manse*, and the benefit of all carriages from the parish,
 “ except the drawing of stones.” The cause was then
 taken to report by Lord Coalston; and the appointment to
 report was renewed at a subsequent calling, in consequence
 of a *viva voce* debate of the minutes.

On the part of the minister it was stated, that one of the
 points of debate was, “ whether or not a manse should be
 “ built according to one or other of the plans produced,
 “ *whether the expense exceed 1,000l. Scots or not.*” In
 answer to a proposal on the part of Mr. Leith, that a con-
 sent should be obtained from the whole heritors to exceed
 the sum mentioned in the statute, it was stated on the
 part of the minister, that “ the charger *does not think that*
 “ (viz. the heritor’s consent) absolutely necessary, and must
 “ rest it upon what is already in process.” “ Montgomery
 “ (for the heritor) answered, that he always was, and still
 “ is, willing to pay his proportion of 1,000l. Scots; but he
 “ contends, *that, at no rate, can he be subjected to any more.*”
 The cause having been reported, the following interlocutor
 was pronounced: “ The Lord Ordinary having considered
 “ the memorials for the parties, and plans, and other writs
 “ produced, and *having advised with the Lords thereanent,*
 “ finds that the suspender, and the other heritors of the
 “ parish of Inverury, are *obliged to build a competent manse;*
 “ and in respect the suspender objects to the plan of the
 “ manse approved of by the Presbytery as improper, or-
 “ dains him betwixt and the 11th instant, to give in an-
 “ other plan of a manse, such as he judges proper *and com-*
 “ *petent* for the minister of this parish.”

In consequence of this interlocutor, the heritor procured
 a new plan and estimate of a manse, according to which
 the building would only cost 898l. 14s. Scots. According
 to this plan the front of this house was only to be fourteen
 feet; the side walls to be only sixteen feet high, and two
 feet four inches thick in the first story, and two feet in the
 second story; the chimney-heads to be carried three feet
 above the roof; the walls were to be built with clay instead
 of lime, and the floor of the dining-room was to be of
 earth instead of wood. To this plan the minister gave in
 objections, complaining of the small dimensions of the
 house; of the outer walls not being to be built with lime;
 of the want of a wooden floor for the dining-room, &c.

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Thereafter the court pronounced this interlocutor: " On
 " report of Lord Coalston, the Lords find, that the heritors
 " of Inverury must build a manse and offices for the charger,
 " according to the plan given in for the suspender, with
 " the following variations and additions: 1mo, That the
 " manse is to be thirty-six feet long, and eighteen feet
 " wide within the walls: 2do, That the side-walls are to be
 " twenty feet high above ground, and the gavels of a pro-
 " portional height: 3tio, That the walls of the first story
 " above the ground are to be two feet seven inches thick,
 " and the walls of the second story two feet four inches
 " thick: 4to, That the chimney-heads are to be four feet
 " above the roof: 5to, That the floor of the dining-room
 " is to be laid with deals. 6to, That the partitions are to
 " be made with brick, and standards, &c. of wood, all
 " proper distances; and that the whole of the walls are to
 " be built with stone and lime; and the walls on the inside
 " as well as the partitions and roofs of the first and second
 " stories, are to be sufficiently plastered: 7mo, That the
 " barn, stable and byre are to be eleven feet wide within
 " walls, and the walls to be eight feet high, and wholly
 " built with stone and lime. And in respect of the offer
 " made by the charger of transporting the stones of the
 " old manse at his own expense, find, that the manse and
 " office-houses are to be built upon that part of the glebe
 " which is described in the charger's memorial; allow and
 " authorize the charger to call a meeting of the heritors
 " and magistrates of Inverury, to meet at the church of
 " Inverury upon the first Tuesday in September next, and
 " ordain the magistrates and heritors then and there to
 " stent themselves and the burgh of Inverury *with such*
 " *sum of money as may be necessary for executing the plan*
 " *as above mentioned*; and find expenses due to the
 " charger, which they modify to 4 *l.* sterling, and decern
 " therefore, and for the expense of the decree to follow
 " thereon, as the same shall be ascertained at extracting."

The heritor immediately gave in a reclaiming petition,
 in which he stated, in explicit terms, that " the alterations
 " made upon the plan by the interlocutor will make the
 " expense (if the work is to be sufficiently done) *amount*
 " *to more than double the sum in the act of parliament.*"
 In this petition the cause was again argued by the heritor,
 on the general ground that the court had no power to ex-
 ceed the sum of 1,000 *l.* Scots, allowed by the act of par-
 lament. In one part of the petition the clause in the act of

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parliament is quoted ; and it is stated that the “ words are
 “ so express that they leave no room for comment ; and,
 “ under the authority of them, the petitioner maintains
 “ that he, as an heritor of this parish of Inverury, cannot
 “ be decerned to build a manse at a greater expense.” In
 former cases, it is stated, where a large sum was allowed,
 “ a consent of the *majority* of the heritors ” was always
 obtained ; and that in the present case there was not only
 no evidence that such consent was obtained, “ but it
 “ evidently appears *that such consent has been refused.*”

Besides this general argument, which is enlarged upon
 in other parts of the petition, it was stated that, according
 to the plan, as approved of by the Court, the manse would
 be made better than any of the other manses in the
 neighbourhood ; and the heritor particularly objected to
 building the offices with stone and lime. The petition
 concludes with a prayer, applicable to the various pleas
 maintained in the petition ; and, so far as respected the
 general point, the heritor craved that it should be found,
 “ that the petitioner, as a heritor of the parish, cannot be
 “ decerned to build a manse *at an expense above 1,000 l.*
 “ *Scots*, being the maximum *allowed* in the statute 1663.”

Upon advising the petition, the Court pronounced the
 following interlocutor : “ The Lords having heard this pe-
 “ tition, and parties procurators thereon, they find the
 “ offices are to be built with stone and clay, and harled
 “ (plastered) with lime ; and, *with that variation, adhere*
 “ *to their former interlocutor as to the other points*, and re-
 “ fuse the desire of the petition.”

The effect of this judgment was, to allow a sum of about
 2,000 *l. Scots* for building the manse, &c.

SCOTLAND.

COURT OF SESSION.

ROBERT ANGUS, JAMES TOD, WIL-
 LIAM CURRIE, JAMES BARCLAY,
 sen., JAMES BARCLAY, jun.,
 JOHN ALLAN, JOHN FLEMING,
 HENRY ARNOTT, ROBERT WAL-
 KER, and WILLIAM STEWART. } *Appellants.*

DUNCAN MONTGOMERIE, DAVID
 WISHART, JOHN MONTGOMERIE,
 and JOHN GULLAND. } *Respondents.*

In a summary complaint under the act of 16 Geo. II, c. 11, s. 24, respecting a wrong alleged to have been done upon the election of magistrates and councillors of a Scotch burgh, by the express provisions of the act it is necessary that all the magistrates and councillors, should be parties in the proceeding below, and, as Appellants or as Respondents, upon appeal to the House of Lords; as, upon a similar proceeding before the act, by action of declaratur, all persons interested must be parties. Where the whole body are not before the House no judgment can be given. Cases which have been decided contrary to this doctrine (*semb.*) are of

In the case of a party, not a magistrate or councillor, but having a vote, where the election is for life, and the party has demitted his office, being struck of the Roll, (*semb.*) there is no authority under the act to summon, and *à fortiori* no authority to hear and decide the case on summary application.

Whether this provision of the act is not confined to summary complaints under the act, and whether there is authority to extend the provisions to actions of declaratur not under the act.—*Quære.*

Upon a summary complaint under the 16 Geo. II, c. 11, s. 24, the Court of Session have no power to award *costs in part*, the act directing that they shall allow to the party who prevails *full* costs of suit.

ACCORDING to the set or constitution of the burgh of Inverkeithing the council consists of fifteen persons at least, viz. the provost, two bailies, the dean of guild, and treasurer, and ten or more inhabitant burgesses.

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The number of the ordinary councillors is indefinite, they must be at least ten. There is no annual election of councillors, as in most burghs; when those of the old council, who are desirous to resign have demitted their offices, the magistrates and old council choose new councillors in the room of those who have resigned.

The *set* further provides, with regard to the election of magistrates and office-bearers on the 29th September yearly, in the following terms: “First, “they elect the provost, then leets five of the council, and chooses two out of them for the ensuing “year; next leets three, and chooses the dean of “guild; and last two, and chooses the treasurer.”

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It has been the practice of the burgh to follow the order here prescribed.

According to custom of the burgh, although there has been no re-election of councillors, those who are duly qualified continue in office during life.

At a meeting of the council on the 29th Sept. 1811, the minutes bear, that the following persons were present, viz. General A. Campbell, provost; W. Turnbull and Alex. Montgomery, bailies; J. Todd, dean of guild; Malcolm Brown, treasurer; Duncan Montgomery, W. Currie, J. Henderson, J. Adamson, Hugh Dawson, Will. Fulton, W. Lillie, D. Wishart, W. Ridley, Andrew Kirk, J. Barclay sen., J. Barclay jun., R. Angus, W. Bouthron, J. Gulland; and deacons J. Dove, D. Wishart, G. Grindlay, and R. Gowie.

At this meeting, after the ordinary forms of procedure were gone through, the council proceeded to the election of magistrates for the ensuing year; and, by a majority of twenty to four, re-elected Mr. Alexander Montgomery second bailie.

The following persons were also allowed to remain upon the roll of councillors:—Duncan Montgomery, John Gulland, William Fulton, David Wishart,

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“ upon the roll of councillors of that burgh upon the
 “ 29th of September last, or to sit, act, or vote in
 “ that capacity, and ought to be struck out of the
 “ list of councillors.—*Secundo*, That Duncan
 “ Montgomery was also disqualified from acting as
 “ a councillor of the burgh, or continuing on the
 “ roll of councillors, and that he ought to be struck
 “ off the same.—*Tertio*, That John Gulland, Wil-
 “ liam Fulton, and David Wishart, were disqualified
 “ from being councillors of the burgh, and that they
 “ had no right to sit, act, or vote upon the 29th of
 “ September last, and ought to be struck off the roll
 “ of councillors.—*Quarto*, To find that Captain
 “ John Montgomery, a pretended councillor, is not
 “ qualified to sit, act, or vote in that capacity, and
 “ that he ought to be struck off the roll of councillors
 “ of the burgh.—*Quinto*, That John Muckersie,
 “ a pretended councillor, is not qualified to sit, act,
 “ or vote in that capacity, and that he ought to
 “ be struck off the roll of councillors of the burgh.
 “ —And *lastly*, To find the complainers entitled to
 “ full costs of suit; and find, decern, and declare
 “ accordingly.”

This petition was founded on the 16 Geo. 2, c. 11,
 s. 24, which provides, “ That it shall and may be
 “ lawful to and for any constituent member, at any
 “ meeting for election of magistrates or councillors;
 “ or of any meetings previous to that for the election
 “ of magistrates and councillors respectively, who
 “ shall apprehend any wrong to have been done by
 “ the majority of such meeting, to apply to the Court
 “ of Session by a summary complaint, for rectifying
 “ such abuse; or for making void the whole election

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“made by the majority; or for declaring and
 “ascertaining the election made by the minority,
 “so as such complaint be presented to the Court
 “of Session within two calendar months after
 “the annual election of the magistrates and coun-
 “cillors; and the Court shall thereupon grant
 “a warrant for summoning the magistrates and coun-
 “cillors elected by the majority, upon thirty days
 “notice, and shall hear and determine the com-
 “plaint summarily, without abiding the course of
 “any roll; and shall allow to the party who shall
 “prevail their full costs of suit.”

Answers were given in to this petition and com-
 plaint on the part of Gen. A. Campbell, provost;
 W. Turnbull, and A. Montgomery, bailies; And.
 Kirk, dean of guild; and Malcolm Brown, treasurer;
 D. Montgomery, W. Bouthron, W. Fulton, J. Hen-
 derson, J. Adamson, D. Wishart, W. Lillie, J. Mont-
 gomery, J. Muckersie, H. Dawson, J. Gulland, and
 Major-General D. Ballingall, councillors; and J.
 Dove, deacon of the incorporation of bakers; and G.
 Grindlay, deacon of the incorporation of weavers;
 all of the said burgh, at Michaelmas 1812;—and

To this condescendence answers were given in for the respondents, and the other parties then defenders.

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A proof was allowed to the parties ; and after some further procedure, pending which A. Montgomery, one of the original defenders, died ; and General Campbell petitioned the Court to allow his name to be withdrawn from the list of Respondents to the complaint, on the ground of his having, on the 17th December 1814, addressed a letter to the provost, magistrates and council of the burgh of Inverkeithing, in which he resigned then, and for ever, any right he might have to the office of councillor in the said burgh : the proof was reported.

Having heard counsel on the import of the evidence, the Court ordered memorials ; on considering which, they pronounced the following interlocutor :

“ The Lords having advised the petition and complaint of R. Angus, J. Todd, and others, with the answers thereto, replies and duplies, depositions of witnesses adduced, and writs produced, and memorials for both parties ; they find that the said complaint is competent against such of the Respondents as were continued on the roll of councillors of the burgh of Inverkeithing at Michaelmas 1812, in so far as they, or any of them, were by law disqualified from being so continued : Find, that by the set and constitution of the said burgh, the councillors thereof must be inhabitant burgesses, and, therefore, sustain the objections of non-inhabitancy made by the complainers against the continuance of the following persons on the said roll at Martinmas 1812, viz. J. Muckersie, J. Gulland, D.

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“ Wishart, W. Fulton, and Capt. J. Montgomery :
 “ Find, that the said persons, and each of them,
 “ were disqualified from being so continued, or from
 “ acting as councillors of the said burgh, and grant
 “ warrant to, and ordain the clerk of the said burgh
 “ to expunge their names from the said roll, and
 “ decern accordingly. Repel the whole objections
 “ to the continuance of D. Montgomery and Alex.
 “ Montgomery on the said roll of councillors at
 “ Michaelmas 1812 ; and also repel the whole objec-
 “ tions to the election of Alexander Montgomery
 “ as a bailie of the burgh at Michaelmas 1812 ;
 “ and assoilzie them, and each of them, from the
 “ conclusions of the said complaint, and decern ;
 “ but find none of the parties on either side entitled
 “ to expenses of process.”

Against this interlocutor the Appellants presented
 a petition, praying the Court “ to alter the interlo-
 “ cutor complained of, so far as regards Duncan
 “ and Alex. Montgomery ; and to decern in terms
 “ of the petitioners complaint, and to find them
 “ entitled to expenses.”

This petition was refused.

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“ The Lords having resumed consideration of this
 “ petition, with the additional petition, answers
 “ thereto, and whole cause, they alter the interlo-
 “ cutor reclaimed against, and find the complaint
 “ incompetent, in as far as the same concludes
 “ against Capt. J. Montgomery, D. Wishart, and J.
 “ Gulland, in respect there was no special objection
 “ stated against them at the Michaelmas election
 “ 1812, no vote put upon such special objection, and
 “ consequently no wrong done by the magistrates at
 “ that election : therefore dismiss the said complaint,
 “ assoilzie the said Capt. J. Montgomery, D. Wishart,
 “ and J. Gulland, from the conclusions of the said
 “ complaint, and decern : Find the complainers liable
 “ in expenses, in as far as respects those incurred
 “ in discussing the point of competency ; allow an
 “ accompt to be given in, and remit to the auditor
 “ to tax the same upon the principle above expressed,
 “ and to report.”

A petition against this interlocutor on the part of
 the Appellants was refused ; and the appeal was
 presented from these interlocutors.

For the Appellants :—

The Respondents having in the pleadings below 5 Feb. 1821.
 joined issue on the question of residence, have thereby
 waived the objection to the competency. It is not
 an objection which nullifies the proceedings, or which
 the Court is bound to notice. The defenders having
 proceeded on the question of residence, it must be
 taken for granted that the special objection, if neces-
 sary, was taken at the election. As to the argument
 upon which the judgment below proceeds, it is

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a fallacy. It has been decided * that persons not present at the election may complain of wrongs done by those who were present. If so, a specific objection to be made at the election cannot be necessary. In many cases † persons present, and not objecting, and even concurring in the proceedings at an election, have afterwards raised a complaint under the statute without objection. As to the argument that no wrong was done at that election, because the parties had been elected for life at former elections, the re-election or continuance of those persons as councillors is a wrong within the statutes, and the continuance is equivalent to a new election. If objection were necessary, the general protest made against illegal votes was sufficient. There was in fact an election of magistrates, and Wishart and Gulland, two of the persons against whom the complaint is made, did vote. The fallacy seems to have grown out of the misapplication of the statutory enactments in the case of freeholders of a county‡. But as to them, the statute has not said generally if *any wrong be done* it shall be competent to complain. The statute refers to the four cases of a claim re-

in each of these cases. But there is no such provision in the case of burgh elections*. In one † case as to a freeholder, where he had altered his status by parting with his freehold qualification, the complaint against the continuance of a person on the roll was found competent, although no special objection had been made at the meeting ‡.

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For the Respondents.—The conclusion of the petition and complaint, so far as it complains of the continuance of Alexander Montgomery and the other persons mentioned on the roll as councillors, and prays that they may be struck off the roll, is incompetent.

This is a summary proceeding under the statute not according to the ordinary course of the Court.

* 16 Geo. II, c. 11, s. 22 & seq.

† *Dempster v. Lyall*, March 3, 1791. Dict. 8868.

‡ Whether actual residence is essential, and whether councillors elected for life were removable upon ceasing to reside, were questions not much discussed upon the hearing of the appeal, which was decided upon a preliminary question of form. On the heads of annual election and residence, see the following authorities *pro*:—

Leges Burgorum, c. 77; stat. 1469, c. 30; stat. 1487, c. 108; *Wight*. pp. 333. 344; *Bankton*, v. 2, b. 4, tit. 19, par. 8; case of the Mayor of Inverkeithing, *Elchies Decis. Burgh Royal*, No. 22; *Falconer*, vol. 1, p. 60; *Holburn v. Haldane*, D. P, July 11, 1761; *Kames*, Dec. *voce* Citation; *Dalrymple v. Stoddart*, 7th Aug. 1778. *Lamb v. High*, citing *Millar v. Nicholson*, 29 July 1789; *Cochrane v. Henderson*, 6th Feb. 1807.

Con:—The case of *Dumfries*, *dict.* of Dec. v. *Burgh Royal*, p. 1840. That necessity of residence applies only to office-bearers, not to councillors; *Anderson*, 17 Feb. 1749; *Dunbar*, 7 Jan. 1757; *Id.* p. 1842; *Munro v. Forbes*, 10 July 1784; D. P. 3 May 1785; and the Records of the Borough.

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The proceeding intended by the Legislature is not one for determining a question of right. In such a case the party must be left to his remedy by the common course of the law, viz. to his action of declarator *.

The complaint admits that the parties were on the roll of councillors previous to the election complained of; and it admits, that by the set or custom of the burgh the councillors *continue during life, without re-election*. But it affirms, that if they cease to be inhabitants *it is competent to object to them, and to apply to the Court to have them struck off*; and it concludes accordingly, by praying the Court, upon the merits of the case, *to find and declare as in a declaratory action*.

A meeting which adopts a practice sanctioned by long usage have not committed a wrong for which an immediate remedy is necessary, and which, if they attempt to defend, they must be *vi statuti* liable in costs. The whole frame of the statute shows that it had in contemplation those acts of injustice, or of culpable mistake, which were plain, and which tended to produce immediate injury to the individual

For the Appellants, *The Attorney-General*, and
Mr. W. Adam.

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For the Respondents, *Mr. C. Warren*, and
Mr. J. P. Grant.

[In the course of the argument the following observations were made by the Lord Chancellor and Lord Redesdale.]

The discretion which the Court below has exercised on the subject of costs is not given by the act *, which provides that full costs of suit shall be given.

The 7th Geo. II, c. 16, s. 7, does not name and limit the parties to be summoned on the complaint given by that act. But the 16th Geo. II, c. 11, s. 24, requires that the magistrates and councillors elected by the majority should be summoned upon a warrant issued by the Court. It requires, therefore, expressly, that all of them should be parties. How the decisions are to be reconciled with the provisions of the act it is difficult to see. Suppose a man had been struck off the roll who had a vote, not being a magistrate or councillor, how could he be summoned under the act? Or where the election is for life, and the party has demitted his office, if he is struck off the roll, it may be doubted, notwithstanding the decisions, whether the Court has jurisdiction to summon the party, much less to hear and decide the case. In these acts giving summary jurisdiction, the power must not be extended beyond the cases for which express provision is made. Where are the words of the act which give jurisdiction to strike off the Roll?

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According to the act, in these cases of summary complaint, the proceeding must be commenced two months after the election. How can that provision be applied to the case of an election which took place twenty years before? The act speaks of a wrong done by the majority. In this case, so far as concerns the act of continuing the councillors on the Roll, it must be considered unanimous; for it does

is generally an accurate writer, it does not appear that in the House of Lords there was any question or decision as to the limitation of two months on such actions. It was an action of reduction at common law. The decision is in general terms, no special ground being stated.

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In this case many of the councillors are not parties to the appeal. If they had been made parties, and the petition had prayed that they might answer, judgment would have been given against them by default if they had not appeared upon the usual summons. We can do nothing against them in their absence, if you have not, by your proceeding in the appeal, given them the opportunity of appearing. We can only give judgment against those who are before the House individually, or against the whole body who are not before the House.

The *Lord Chancellor* :—I have looked anxiously 28 Feb. 1821. into the statute and the authorities, and considering the circumstances of this case, I can only advise the House to affirm the judgment, taking care distinctly to express in the terms of the order, the grounds on which it is made.

2 March 1821.

The Lords find, that in the circumstances of this case an application by summary complaint to the Court of Session of Scotland could not be sustained, with respect to the Respondents, now before this House. It is therefore ordered and adjudged, that the appeal be dismissed, and the interlocutors complained of, so far as they relate to the Respondents now before this House, be affirmed.

IRELAND.

COURT OF CHANCERY.

JANE HIGGINS - - - - - *Appellant*;
 LAURENCE Earl of Rosse - - - *Respondent*.

By a deed executed in 1708 lands were vested in *A.* for life, remainder to *B.* for life, remainder to the issue of *B.* in tail, remainder to the heirs male of *A.* remainder to the right heirs of *A.* with power to *A.* and *B.* successively
 “ to grant leases for lives of any part of the lands in settlement, renewable for ever, without fine to be taken
 “ for any such *first* lease; such lease not to be of more
 “ lands than six plantation acres, at the best rent, with
 “ covenants to be in such leases for building, &c.”

In 1726 *A.* grants to *P.* (underwhom the Appellant claims) three leases, the two first being of houses and gardens, together with six plantation acres to each; the third lease being of a house, garden, and three acres; and all three leases being for three lives, with a covenant for renewal on application within six months after the failure of each life, on paying 4 *l.*, and in case of neglect to forfeit the right of renewal.

In 1730 a new settlement is made, by which the lands are limited to *A.* for life, remainder to *C.* the son of *B.* (deceased) for life, remainder to the issue of *C.* remainder to several brothers of *C.* for life, in succession, and their issue in tail in strict settlement; remainder

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By articles in 1754, and an act of parliament in 1758, the lands were limited to *C.* for life, remainder to *W.* for life, remainder to the issue of *W.* in tail, remainder to the right heirs of *C.* The act of parliament in pursuance of the articles vested a power in *C.* and *W.* severally in succession, to grant leases for three lives renewable for ever, of *any plot* for a house and garden in, &c., and any quantity of land not exceeding ten acres.

In 1779, by deed and recovery, the lands were limited, in default of appointment, to *W.* for life, remainder to *L.* (the Respondent in the appeal) in fee.

In 1786, *W.* the tenant for life named in the preceding settlement, renewed all the leases by deeds purporting to be executed in pursuance of the covenant for renewal, reciting the original leases of 1726; and that the leases had been frequently renewed; and containing covenants for renewal as in the original leases.

Further renewals to the same effect, and in the same form, were executed by *W.* in 1790.

W. died in 1791, when the fee vested in the Respondent.

It did not appear, by direct proof, or otherwise, than by the recitals in the deeds of 1786, that any renewal had been made between 1735 and 1786. The rents reserved upon the leases were from time to time, and up to 1807, paid to and received by the owners of the lands for the time being, *including the Respondent*. In 1807 two of the *cestuy que vies* being dead, application was made to the Respondent for renewal, and upon refusal a bill was filed in Chancery to compel a specific performance of the covenant to grant renewals. The Bill was dismissed without costs, and on appeal the judgment was affirmed, on the ground (*semb.*) that the leases were not warranted by the power.

Where a lease not warranted by a power is granted by a tenant for life, containing a covenant for perpetual renewal, the reversioner, by accepting for many years after he comes into possession the rent reserved upon the lease, does not confirm it so far as to make the covenant for renewal binding upon him.

BY marriage settlement bearing date the 15th of Oct. 1708, and made between Sir W. Parsons and

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William his son, and M. Parsons, of the first part; and certain trustees of the second, third, and fourth parts; the manor, &c. of Parsonstown were conveyed to the trustees of the second part, and their heirs, to the use of *Sir W. for life*; rem. to trustees to preserve, &c.; rem. to *Will. Parsons for life*; remainder to preserve, &c.; rem. to the issue of that or any future marriage of Will. in tail male; rem. to the heirs male of Sir W. with *remainder to his right heirs*.

The deed contained a *general* leasing power to Sir W., and to Will. Parsons to lease, &c., for any term not exceeding twenty-one years, or three lives.

There was also a power to Sir W. Parsons during his life, and after his death for Will. Parsons, during his life, to make leases for lives renewable for ever, without fine, present, or income, to be taken for any *such first lease* of any part of Parsonstown, and the other lands contiguous thereto, (the mansion-house, &c. excepted,) such lease not to contain or be of or for more lands than six plantation acres, at the best improved rent, with *covenants* to be in such lease or leases *for building* and improvements, and the fine to be taken for such lease

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situate in Parsonstown, together with six acres of land, plantation measure, to hold all and singular the said demised premises, with the appurtenances, to N. Pritchett, his heirs and assigns, for the lives of the three persons therein named, and the survivors of them, and during the life and lives of such other person and persons as should for ever be added during the demise, at the yearly rent of 8 l. sterling, with clauses of distress and re-entry in case of non-payment.

The lease contained a covenant by Sir William Parsons for perpetual renewal, by adding new lives on payment of a small fine, such life to be renewed within six months after the falling of each life.

By another lease, bearing the same date, and made between the same parties, Sir William Parsons granted and demised to Nicholas Pritchett the house and garden wherein R. Gillespie of Parsonstown, sadler, dwelt, together with six acres of land, plantation measure, in Lough Guir, then or late in possession of Philip Langton, To hold for the three lives mentioned in the first lease, at the yearly rent of 4 l. This lease contained a covenant of renewal, upon payment of 2 l. as renewal fine, and clauses similar to those in the first lease.

By a third lease, bearing the same date, and made between the same parties, Sir William Parsons granted and demised to Nicholas Pritchett the house and garden in the Race Lane, near the town of Parsonstown, together with three acres of land, plantation measure, adjoining to the said house and garden, in possession of Philip Langton, To hold

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for the same three lives as mentioned in the first and second leases, at the yearly rent of 2*l.* sterling. This lease contained the covenant for renewal, and clauses similar to those in the two former leases. These leases do not appear to have been registered.

By a deed of settlement, bearing date the 4th of September 1730, made between Sir William Parsons and Laurence Parsons, his grandson and heir-apparent, of the first part; certain trustees of the second, third and fourth parts; and William Sprigge, and Mary Sprigge, his eldest daughter, of the fifth part, reciting certain articles of the 23d and 24th April 1683, and the settlement of 15th October 1708, and also reciting that a marriage was then shortly to be solemnized between Laurence Parsons and Mary Sprigge, Sir William and Laurence Parsons granted and conveyed the manor of Parsonstown, &c. to the trustees of the second part, and their heirs, upon trust, as to part of the lands to the use of Laurence for life, and as to the remainder (subject to a jointure) to the use of Sir William for life; remainder to Laurence Parsons for life; remainder to trustees to preserve, &c.; remainder to the

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This settlement also contained a general and a special leasing power in the words following :—

“ That it shall and may be lawful to and for the
 “ said Sir William Parsons to make leases for three
 “ lives, with renewals for ever, of any house and gar-
 “ den in Parsonstown, with ten acres of land, planta-
 “ tion measure, and no more, to be held therewith,
 “ lying within one mile of the said town, at the best
 “ improved rent that can be had for the same at the
 “ time of setting, reserving half a year’s rent on
 “ every renewal, and to make leases of any part of the
 “ said lands of which the said Sir William is tenant
 “ for life, for the term of three lives, at the best
 “ improved rent that can be had for the same at the
 “ time of setting ; provided always, that such powers
 “ shall not extend to any part of the mansion-house,
 “ gardens, orchards and demesne lands of Parsons-
 “ town : and it is further agreed, that it shall and
 “ may be lawful to and for the said Laurence Parsons,
 “ and for all and every of the brothers of Laurence,
 “ to make leases of all or any part of the said granted
 “ and released premises, as he or they shall be or
 “ come into possession, for the term of three lives, or
 “ thirty-one years in possession, and not in reversion,
 “ at the best improved rent, without fine or income,
 “ with renewals for ever, reserving half a year’s rent
 “ on each renewal, of any plot for a house and garden
 “ in Parsonstown, and ten acres of land to be held
 “ therewith, the said land lying within one mile of
 “ the town, (the mansion-house, and the gardens,
 “ orchards and demesne lands thereof excepted.)”

There was issue of this marriage only one son,

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William, (afterwards Sir William,) the father of the Respondent.

In 1735 a renewal of the third of the leases granted by Sir W. Parsons appears to have been made by an instrument, in writing, annexed to that lease, as follows :—

“ Whereas the annexed deed of lease, bearing
“ date the 11th of February 1726, hath since the
“ perfection thereof, through Nicholas Pritchett,
“ the original lessee, deceased, and Walter Pritchett,
“ his son and heir, also deceased, come by mesne
“ assignment into the hands of John Luther, as by
“ an indorsement on the said deed of lease may
“ appear : And whereas the said Walter Pritchett,
“ one of the lives in the said lease mentioned, died
“ on or about the 23d of August last ; and the said
“ John Luther, pursuant to the clause for renewal
“ in the annexed deed of lease set forth, having
“ this day nominated the life of William Jessop, to
“ be added and inserted in the place and room of
“ the said William Pritchett, deceased : Now I,
“ Sir William Parsons, Bart. in consideration of
“ 1 l. sterling, or half-yearly rent of the annexed

“ Luther, the demised premises in the town of
 “ Parsonstown, his heirs and assigns, and for and
 “ during the natural lives of John Burke and John
 “ Langton, in the next indenture named; and for
 “ and, during the natural life of William Jessop now
 “ inserted in the place and stead of Walter Pritchett,
 “ deceased, and the survivor and survivors of them;
 “ and for and during the natural lives of such other
 “ person, as by virtue of the clause and covenants
 “ in the said lease contained, shall from time to
 “ time for ever hereafter be added during the said
 “ lease or covenants in said lease mentioned, subject
 “ nevertheless unto the clauses and covenants in the
 “ annexed lease reserved and mentioned. In wit-
 “ ness whereof, &c.—12th February 1735.—Wil-
 “ liam Parsons.”

Sir William died in 1749, and between the date of this last renewal and the settlement next stated, it appears that some fines had been levied by Sir Laurence.

In Hilary term 1754, a recovery of the estates was suffered by Sir Laurence Parsons and William his son, and the uses thereof were, by deed dated 19th January 1754, declared to be to such uses as Sir Laurence and William should jointly appoint, and in default of appointment to Sir Laurence for life; remainder to the use of William and his heirs.

By articles dated 28th of June 1754, and made between Sir Laurence Parsons and William Parsons, of the first part; Margaret Cleare, mother and guardian of Mary Cleare, and the said Mary Cleare,

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of the second part ; and certain trustees of the third and fourth parts ; Sir Laurence Parsons covenanted with Margaret Cleare, her executors, administrators and assigns, that within twelve months after Mary Cleare should obtain her full age of twenty-one years, and should join William Parsons, her intended husband, in a fine or fines of the real estates therein mentioned, to enure to the uses and purposes therein mentioned, Sir Laurence and William Parsons should and would levy one or more fine or fines, and suffer one or more common recovery or recoveries, wherein all necessary parties should join ; and by good and sufficient deed or deeds, conveyance or conveyances, limit and convey the manor, &c. of Parsonstown, with the several other towns and lands therein mentioned, the estates of Sir Laurence and William Parsons, or one of them, subject as therein mentioned, to the use of Sir Laurence Parsons for life ; remainder to William Parsons for life ; remainder to trustees to preserve contingent remainders ; remainder to the first and other sons of the marriage in tail male ; with remainder to the right heirs of Sir Laurence Parsons.

for the best rent, &c.; and that Sir Laurence Parsons and William Parsons might also make leases for three lives, with renewals for ever, reserving half a year's rent as a fine on each renewal of any plot for a house and garden in the town of Birr, (Parsonstown,) and of any quantity of land not exceeding ten acres, English statute measure, to be held therewith, &c.

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These articles were registered on the 2d July 1754, and carried into effect by a private act of Parliament, passed on the 29th of April 1758.

The Respondent is the eldest son of this marriage.

By deed, leading the uses of a recovery, which was suffered accordingly, dated 20th of October 1779, and made between Sir William Parsons and the Respondent, then Lawrence Parsons, his eldest son, Thomas Dames, and Jonathan Darby, of the first part; Edward King of the second part; and Robert Close of the third part; the manor and lands were vested in Edward King, and his heirs and assigns, as tenant of the freehold, for the purpose of suffering a recovery, the uses of which are by the deed declared to be as follows:—To the use of such persons, and for such estates, as Sir William and Laurence Parsons, or the survivor, should in such form as therein specified declare, direct, limit or appoint; and for default of and until such declaration, direction, limitation and appointment, to the use of Sir William Parsons and his assigns, for and during the term of his natural life, without impeachment of waste, and with all such powers as he now has over the same, and from and immediately after

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his decease, to the use and behoof of Laurence Parsons, his heirs and assigns.

By deed of renewal, bearing date the 30th day of August 1786, made between Sir William Parsons of the one part, and Philip Langton of the other part; reciting the original lease of the 11th day of February 1726, made between Sir William Parsons, deceased, the grandfather of Sir William, party thereto, and Nicholas Pritchett; and also reciting, that Philip Langton, by mesne assignments, or otherwise, was then become entitled to the benefit of the said lease and covenant for the renewal therein contained; and that the *said lease had been frequently renewed*; the deed witnessed, that Sir William Parsons, in pursuance and execution of the said covenant for renewal, did demise and grant unto Philip Langton, the house and garden wherein Robert Gillespie, formerly of Parsonstown, sadler, dwelt, together with the other houses thereunto belonging; as also six acres of land in Lough Guir, formerly in the possession of Philip Langton, deceased; To hold the same, with all the rights, members and appurtenances whatsoever, for the lives of the three per-

in the original leases; and like renewals were also executed of the two other leases.

By deed, dated 23d December in the year 1790, and made between Sir William Parsons of the one part, and Philip Langton of the other part, reciting the original lease of 11th of February 1726 to Nicholas Pritchett, and reciting that the same was taken in trust for Philip Langton; the said indenture witnessed, that Sir William Parsons, in pursuance and execution of the covenant of renewal in the said original lease, and in consideration of the rent and covenant in the same, demised and granted all the said lands and premises comprised in the said second-mentioned original lease unto Philip Langton, his heirs and assigns, for the lives of the three persons therein named, and the lives and life of all such other person and persons as should from time to time thereafter be added thereto by virtue of the covenant for perpetual renewal in the said indenture of lease contained, subject to the yearly rent, renewal fines, and covenants in the original lease.

This deed of renewal contained a covenant for perpetual renewal by Sir William Parsons to Philip Langton, in the ordinary form. Like renewals were executed of the two other leases. Sir W. Parsons died in 1791, no appointment having been made under the settlement, whereupon the remainder in fee, for default of appointment, vested in the Respondent.

It did not appear by any direct proof, or otherwise, than by the recital in the deed of 1786, and presumptions from that recital, that the leases, or any of them, had been renewed between the years

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1735 and 1786. The rents reserved upon these several leases were from time to time, up to the year 1807, paid to and received by the several persons successively becoming entitled to and seised of the reversion in the lands, including the Respondent.

After the renewals of 1790, two of the *cestui que vies*, named in the deeds of that date, had died, but at what particular time did not appear.

In the Appellant filed a bill in the court of Chancery in Ireland, alleging that he had not until lately received intelligence of the death of the *cestui que vies*; and stating the facts before mentioned, prayed that the Respondent might be compelled to grant renewals of the leases, on payment of the fines due, with interest, which had been already tendered. The Respondent by his answer insisted that the *grantors* of the leases having exceeded the power, the leases were void; whereupon the Appellant filed an amended bill, stating the acceptance of rent under the leases, the possession of the counter-parts by all the successive owners of the reversion, no one of whom had objected to the leases as violations of the power,

1816 the Appellant, as heir at law, revived the cause and brought this appeal.

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For the Appellant :—

The case of the Appellant is entitled to particular favour, from an undisturbed and undisputed possession of eighty years under renewable leases ; a title which has been termed, “ the local law “ and the old equity of the kingdom of Ireland,”* *Mayor of Hull v. Horner*†; *Eldridge v. Knott*‡; citing a case, where (it was said) an act of parliament was presumed ||.

Sir Laurence Parsons, the Respondent’s grandfather, was tenant in tail male under the settlement of 24th of April 1683, on which, and the subsequent settlements, the Respondent rested his defence to the original and amended bill of Philip Langton, the complainant below : Sir Laurence Parsons levied a fine of all the property included in the leases ; considering him to be tenant for life, his fine operated as a forfeiture of his life-estate, and gave him a base fee until ousted by entry or claim of a person having an adverse title, and there never was such person ; all the subsequent owners received the rent upon the leases. If Sir Laurence executed any leases of the property, his fine necessarily had the effect of confirming or establishing them ; if he did not execute any leases, but did any act which, in the contemplation of a court of equity, amounted to an agreement to confirm and establish the leases made by his ancestors or predecessors in title, his fine

* 2. Ridgw. Parl. Ca. 405, 406.

† Cowper 102.

‡ Id. 215.

§ By Lord Mansfield. *Quære.*

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would confirm and establish those leases in equity. Now, Mr. Langton's bills expressly charge, and the Respondent's answers do not deny, that Sir Laurence renewed the subsisting leases; the Respondent's answers also state and insist on Sir Laurence's right to receive the rents, and his actual receipt of them; but he could only have this right in consequence of either having executed, or having agreed to execute, a renewal; which ever it was it was necessarily established by the fine.—*Goodright v. Mead and Shiloon*.*

Sir William, the Respondent's father, died in 1791, and the Respondent himself received the rents from that time till 1807, when the complainant filed his bill, and all that time had the counter-parts of the leases in his possession; this amounts to an acquiescence in the leases, and an agreement to confirm and establish them.

Suppose that it was competent to the Respondent, when his title accrued, to dispute the lease, having suffered five years to elapse the right is gone. Long acquiescence applies equally to the right of renewal and to the lease.

If such leases or agreements are not to be judicially presumed, there has been an uniform neg-

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at a period of about seventy years preceding the filing of the bill in the Court below.

None of the Respondent's objections to the leases, on the ground of their not being warranted by the power of leasing contained in the settlements of 1708 and 1730, can be supported. The covenants for building, &c. apply only to a first lease, and after so great a lapse of time it must be presumed that this is not a first lease, but a confirmation of some prior lease, which probably conformed to the settlement. Besides, the houses having been in fact built as if the covenant had been inserted, the reversioner is not damnified, and equity will aid the defect. According to the argument of the Respondent, no leases could be made by any tenant for life where houses had been actually built, which is contrary to the principle of the decision in *Shannon v. Bradstreet*.* That the leases are, at all events, conformable to the power in the deed of 1730, which extends to a house and garden, with ten acres, and requires no covenant for building to be inserted. There have been grants under that power, and even where two powers exist, and one is recited in exercising the power; if the act is void under that power, it may be held good under the power not recited. This, in effect and principle, was decided in the case of *Tomlinson v. Dighton*†, where the question was, whether it was a conveyance of an interest by a tenant for life, or the execution of a power not recited.

The Respondent, according to his own argument, being a purchaser, is bound by a covenant, the

* 1 S. & L. 60.

† 1 P. W. 149. 10 Mod. 31 & 71.

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covenant for perpetual renewal, of which he had notice at the time of his purchase, although the co-nantor had no power, *Taylor v. Hibbert**. In this case the Respondent became a purchaser with notice. As to the rent reserved, it must now be presumed that it was the best that could be had. That the three leases are made to one person is not more injurious to the reversioner than if they had been made to three persons.

It was a fraud on Mr. Langton, the complainant below, to permit him to expend the considerable sums of money, proved in the cause to have been expended by him, from the year 1791 (when the Respondent's supposed title to the possession accrued) till 1807, when Mr. Langton filed his bill, in valuable and permanent improvements of the premises, without the Respondent's giving him notice of its being his intention to dispute the right of renewal.

If the Court of Exchequer were of opinion that the leases were void for informality, and that Mr. Langton was not entitled to the renewal prayed for in his bill, the Court ought to have decreed a renewal of the leases on the terms that

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same term, for the same lives, and to the same person, were manifestly a contrivance to let to one person one piece of ground, containing in all about fifteen plantation acres, but so let in three leases instead of one, merely to evade the settlements; they are therefore to be considered as one lease, and not as three distinct leases, and thus as demising a greater quantity of land Sir William, the lessor, was permitted by the said power so to let: It appears that the lessee and his family have ever since continued in the possession of the lands as if included in one single lease; and this attempt to evade the settlements, in taking three leases instead of one, clearly proves, that the lessee had full notice of the settlements, as such division could be for no other purpose than a fraudulent evasion of them.

The leases contain no covenant for building on the land not already built upon, nor for keeping in repair houses already built, for want of which the whole object and policy of the leasing power was liable to be defeated, the estate loaded with a perpetual lease, and the tenant at liberty either not to build or to let the houses fall, and convert the ground to other purposes quite foreign from the improvement of the town*.

The attempt in the court below to sustain the renewals of 1786 and 1790, as substantive demises, to take effect under the then existing powers, was not warranted by the terms of those powers.

The articles of 1754, and act of Parliament, omit the power of leasing a house and garden for

* *Jones v. Verney*, Willes, 169.

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ever, which was contained in the preceding settlement of 1730, and only authorize the leasing a plot for a house and garden, &c.

This omission must be considered as having been purposely made, and with the obvious intent in future of restraining the tenant for life from making a perpetual lease of a house, &c.; and it would appear that the reason of the family having thus by the subsequent settlement of 1754, left out the power of leasing a house, and confined and restricted the power of leasing to a plot for a house, arose from the experience they had, that the power of leasing a house already built did not promote sufficiently the object they had in view, namely, the improvement of the town of Parsonstown, and therefore they wisely confined the leasing power to a plot for a house.

The omission was evidently with a view that no lease with covenant for perpetual renewal should be from thenceforward, except of plots for houses, &c. and this intention could not have been effected without obliging the tenant to build; that is, all such leases should contain building covenants, for

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sidered valid, as to make it operate as an original substantive demise, when he must have supposed that he was only executing a renewal in virtue of a covenant supposed to attach on the estate. In the one case, the lessor makes no estimate of the present value, which in the other he does; and most certainly in 1786, when he executed the first renewal, Sir William, had he conceived that he was making an original lease, would have reserved more rent than was reserved in the original leases in 1726, upwards of 60 years before.

As to the points of acquiescence and improvements when investigated, there is nothing resulting from these considerations that could alter or affect the rights of the Respondent, or that ought in any manner to influence a court of equity on the subject, especially as the point was not raised by the pleadings, or made matter of argument in the court below.

As to the attempt made to support those leases, as a charge upon the ultimate reversion which was vested in the lessor in 1708, that question was not raised in the pleadings or arguments below; if it had been raised, it might easily have been answered. It will be found that that reversion has been long since barred and extinguished by the recoveries suffered in Hilary 1754 and Michaelmas 1779, of the intervening estates-tail, under which recoveries the Respondent claims.

These leases, having been executed by the tenant for life, can only take effect out of the powers annexed to his estate; but to do so they should have been made conformable to all the substantial conditions of those powers; and although they might charge

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the ultimate reversion, had it come into possession, yet as the Respondent does not claim under that reversion, but as a purchaser under the estate-tail, (enlarged into a fee by the recovery of 1754.) there can be no ground at law or in equity to bind his estate by any leases not conformable to the leasing powers.

For the Appellants, *The Attorney-General, Mr. Butler*; (and *Mr. Sugden*, who replied in the absence of the Attorney-General.)

For the Respondents, *Mr. Hart* and *Mr. Wetherell*.

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In the course of the argument upon the question, as to the effect of the fines levied by Sir Laurence, Lord Redesdale observed, that the deed of 1730 altered the state of the reversion, which, according to the limitations of that deed, was not in the person who levied the fines, so as to cause a merger. Upon the question as to the effect of the leases of 1786 and 1790, he observed that they purported to

the power in the deed of 1730, Lord Redesdale observed, that, when that lease was granted, Sir W. Parsons was bound by the articles of 1754, and the provisions of the act by which they were carried into effect; and with respect to the fines by Sir Laurence, (he again observed) that the settlement of 1730 had limited the reversion to several brothers in succession; that the immediate reversion had been taken out of Laurence by that deed; and that the ultimate reversion in fee to Laurence, limited by that deed, was not the immediate reversion expectant upon the estates-tail.

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On the 9th of March 1821 the judgment was affirmed without further observation.

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COURT OF SESSION.

SIR WILLIAM FRANCIS ELIOTT, of } *Appellant;*
Stobs, baronet - - - - - }

GEORGE POTT, Tacksman of the } *Respondent.*
Farms of Langside and Penchrise }

A deed, in the form of a bond of tailzie, declared in the prohibitory clause that it should not be lawful for the entailor, nor any of his heirs or successors, to sell; and he and they were thereby bound and obliged not to "sell, analzie, wadset, *dispone*, dilapidate, and put away the lands," &c. The irritant clause is thus expressed: "and if I, or any of the heirs, whether male or female successive, shall contraveen, &c. by the said heirs female, not using the surname, &c. or who, whether male or female, and I shall *dispone* the said lands, &c.; and if I, or any of the persons or heirs foresaid, whether

and rendered the prohibition effectual, and the act of contravention void, in a question between third parties as lessees, purchasers, or creditors.

BY a deed in the form of a bond of tailzie, and executed in the year 1719, by Sir Gilbert Eliott, it is “declared that it shall not be leisome nor law-
“ful to me the said Sir Gilbert Eliott, nor to any
“of my heirs and successors foresaid to sell, and
“I hereby bind and oblige me and them not to sell,
“analzie, wadset, dispone, dilapidate, and put away
“the said lands, baronies and estate, or any part or
“portion thereof, heritably and irredeemably, or
“under reversion, (except in so far as the faculties
“above written do extend), nor contract or ontake
“debts thereupon, or grant bonds or other securities
“therefor, nor do or commit any other facts,
“deeds or delicts, civil or criminal, whereby the
“said lands and estate may be anyways apprized,
“adjudged, forfaulted, evicted or affected, nor to
“infringe, alter or innovate this present substitution
“and course of succession, in defraud and prejudice
“of the subsequent heirs of provision above men-
“tioned, conform to the order and substitution
“above specified; neither shall it be lawful to me,
“nor to any of my heirs of provision foresaid, whe-
“ther male or female, to suffer the said lands,
“baronies and estate, or any part thereof, to be
“adjudged or apprized for debts to be contracted,
“but shall be obliged to redeem the same within the
“space of eight years after deducing and leading
“any such diligence: And if I, or any of the said

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“ heirs, whether male or female successive, shall
“ contraveen the premises, or do any fact or deed
“ in prejudice hereof by the said heirs female, not
“ using the surname of Elliott and my arms and title,
“ or by the said unmarried heirs female not marry-
“ ing a gentleman who, and their heirs, shall not
“ use the same and my arms and title as above ; or
“ by the said heirs female, and they and their hus-
“ bands and children not using the said surname,
“ arms and title as aforesaid ; or who, whether male
“ or female, and I shall dispone the said lands and
“ estate, or any part thereof, or contract debts, or
“ commit any other fact or deed during their respec-
“ tive marriages, or in favour of their respective
“ husbands, wives and children, (except in so far as
“ is above provided,) whereby the said lands and
“ estate may be evicted or affected in manner fore-
“ said ; or shall permit the same or any part thereof
“ to be adjudged or appraised for any such debt and
“ deeds, and not redeem the same within the limited
“ time foresaid after leading thereof ; and if I, or
“ any of the persons and heirs foresaid, whether
“ male or female, shall infringe or alter the succes-

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“ other persons, doers of said deeds and committers
 “ of said contraventions or any of them, shall amit
 “ their right of succession, and be debarred from the
 “ said lands and estate ; and all the infeftments and
 “ other rights thereof shall from thenceforth expire
 “ and become void as if they had never been
 “ granted ; and the same shall accress to the next
 “ immediate person appointed to succeed to the said
 “ estate, and so forth, successive in case of divers con-
 “ traventions ; and that free of all debts, deeds, and
 “ delicts done, contracted, or committed by the con-
 “ traveeners ; and it shall be leisome to the next
 “ succeeding heirs to use and prosecute any legal
 “ way or method competent for establishing the
 “ right thereof in their persons, or in the persons of
 “ the remanent heirs of provision foresaid to succeed
 “ to them in manner above exprest.”

Under this entail Sir William Elliott, father of the Appellant, entered into possession of the estate. In the year 1790 Sir William granted to Gideon Pott, father of the Respondent, a lease for nineteen years of the farms of Penchrise and Langside, part of the entailed estate, consisting of between 4,000 and 5,000 acres, at the rent of 281*l.* 8*s.* After possessing the farms four years upon this lease, a new transaction was entered into between the parties. On the 20th March 1794, Sir William granted a new lease of the same farms to Mr. Pott, at the rent of 285*l.* for 77 years, on payment of a grassum, which amounted to 2,904*l.* 15*s.* 9*d.* ; and of the same date with the tack, Sir William Elliott granted a back-bond to the tenant, restricting the rent exigible during his life to 200*l.* Sir William

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died in May 1812, and was succeeded by the Appellant his son, who commenced the present action for reducing the lease, as an infringement of the restrictions of the entail.

The action having come before Lord Gillies, Ordinary, the Respondent by his defence maintained, in the first place, that the irritant and resolute clauses of the entail were so inaccurately and so incomprehensibly worded, as to render the entail unavailable against third parties contracting with the heirs in possession of the estate; and secondly, that even supposing the irritant and resolute clauses to be effectual to the extent of the acts of contravention there enumerated, they could not invalidate the lease under discussion, because that enumeration, while it mentioned the act of disposing, omitted that of alienating, under which alone, in the absence of any express limitation of the power of leasing, the lease could be struck at, as contrary to the restrictions of an entail.

On hearing parties the Lord Ordinary, by interlocutor, dated the 27th January 1813, "repelled the reasons of reduction, and assoilzied the

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“ as an alienation ; and finds that alienations are
 “ prohibited by the entail of the estate of Stobs.
 “ But finds that the irritant and resolute clauses
 “ in the same deed of entail contain no reference
 “ to the specific prohibition against alienating, such
 “ as is necessary to render the same effectual against
 “ third parties ; therefore refuses the desire of the
 “ representation, and adheres,” &c. The Appel-
 lant having submitted this judgment to the review
 of the Court, “ they adhered to the interlocutor of
 “ the Lord Ordinary, but found the petitioner not
 “ liable in the expenses of process.”

In pronouncing this interlocutor, the Court being influenced, as it appeared to the Appellant, chiefly by an opinion that the entail was unavailable against third parties, in consequence of the inaccuracy and obscurity of the irritant and resolute clauses, the Appellant presented a petition, in which his argument was principally directed to establish the general efficacy of the entail. But the Court, having heard this petition, adhered to their former interlocutor.

The Appellant, by his appeal to the House of Lords, complained of the interlocutors of the Lord Ordinary of the 27th January and 19th February 1813, the interlocutor of the Lord Ordinary of 17th December 1813, in as far as the same finds that the irritant and resolute clauses in the deed of entail contain no reference to the specific prohibition against alienating such as is necessary to render the same effectual against third parties ; and the interlocutors of the first division of the Lords of the 17th February and 10th March 1814, adhering to the interlocutors of the Lord Ordinary complained

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of. The Respondent also, by his cross-appeal, complained of the Interlocutors, in so far as they find that the lease in question having been granted in consideration of a grassum, and for a period of 77 years, is to be considered as an alienation; and that alienations are prohibited by the entail of the estate of Stobs, and find the Appellant not liable in the expenses of process.

For the Appellant, *Mr. Brougham*.

For the Respondent, *The Attorney General* *.

* This was the second argument. On the first point, the question as to the grammatical construction, no authorities were cited, except that it was urged by Mr. Brougham, that in the Roxburgh and Tillicoultry cases there were the same errors of grammar; but it was argued on general grounds, and the structure of the clauses, on the one hand, that they were unintelligible, on the other, that they were intelligible, though ungrammatical and perplexed, and that they had already received a construction judicially in *Elliott v. Elliott*, May 1803. On the other questions, whether by the word "*dispose*" alienation was prohibited, and whether a lease of 77 years with a grassum was an alienation, the argument was in substance and effect the same as on the similar points in the Queens-

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The Lord Chancellor, after having stated the facts and pleadings, and the points at issue in the cause, proceeded as follows :—It is unnecessary for me to state, that in order to make the prohibition effectual against third parties there must be not only a clause prohibiting the thing to be done, but a clause rendering it null and void, and a clause

Hope's Major Prac. MS. Reg. Maj. b. 2, c. 20 & 23; Ersk. b. 3, tit. 5, s. 1; Craig. Lib. 3, Dieg. 4, s. 5, p. 479, and the *dict.* of Bailey and Jamieson. As to the form of the entail, Jurid. Styles, vol. 1, p. 202.

For the Respondent the following authorities were cited;—Case of Viscount Stormont, Feb. 26, 1662, Stair's Decis.; Mackenzie on Tailzies, v. 2, p. 487; Stair, b. 2, c. 3, s. 56; Erskine, b. 3, c. 8, s. 25; Young v. Bothwells, Dec. 7, 1705, Forbes; Redhaugh v. Bruce, 11 Mar. 1707, Forbes; Cray of Riccarton, 13 June 1712; Baillie v. Carmichael, 11 July 1734; Primrose, 27 Jan. 1744; Kilk. p. 540; Hay v. His Maj. Advocate, 9 Feb. 1758; Creditors of Hepburn, Feb. 1758, affirmed on appeal; Bryson v. Chapman, 22 Jan. 1760; Bruce v. Bruce, 15 Jan. 1799, affirmed on appeal; Craig, p. 340, s. 12; Hope's, Minor Prac. p. 406, tit. 16, s. 11; Stair, b. 2, tit. 3, s. 38; Mackenzie, b. 3, tit. 8, s. 17; Bankton, vol. 1, p. 587, s. 149; Ersk. b. 3, tit. 8, s. 29; Ross, 4 Nov. 1743; Lesslie of Findrassie, 24 July 1752; Balfour of Randieston, 14 Feb. 1758; Case of Duntreath, D. P. 15 April 1771; Hepburn v. Lord Hopetown, 15 Feb. 1732, affirmed on appeal; Campbell v. Wightman, 17 June 1746, Falc.; Sinclair v. Sinclair, 9 Nov. 1749, Falc.; Weir v. Drummond, 28 Nov. 1752; Scott Nisbet v. Young, Nov. 1763; Case of Tillicoultry, Nov. 1763; Kemp v. Watt, 15 Jan. 1779; Stewart v. Horne, 8 July 1789; Brown v. Countess of Dalhousie, 25 May 1808; Craig. L. 2; Dieg. 3, p. 201, s. 27; Bankton, b. 2, tit. 9; b. 3, tit. 2, s. 1, 2, 5 & 6; Ersk. Inst. b. 2, tit. 7, s. 2; Ersk. smaller work, p. 323, tit. 5; Jurid. Styles, vol. 1, p. 502, 503, 504; Russell's Conveyancing, Index, Dallas's Styles, Supplement to Spottiswoode, p. 38; Mack. Inst. b. 3, tit. 5, s. 1.

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resolutive in its nature, so that all the three clauses must strike at the act complained of; and if the one does strike at the act complained of, and the others do not, it would not be effectual as against third parties.

Two appeals have been presented, one of them against that part of the interlocutor which represented the lease in question as an alienation having been granted in consideration of a grassum, and for a period of seventy-seven years; of that appeal it appears now unnecessary to take much notice, because, by many late decisions, such a lease has been considered in this House an alienation; and therefore, if the prohibitory, irritant, and resolutive clauses are sufficient to prohibit alienation, they must now, under the effect of those decisions, be taken to prohibit such a lease as an alienation. With respect to the other appeal, the substance of it is, that the Court ought not to have held the bond of tailzie to be unintelligible; or if they held it to be intelligible, but that the act which is to be taken as the alienation was not struck at by all the irritant and resolutive clauses, that they erred in so consi-

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dispone, as much as it would be struck at by the word *alienate*, if the word *alienate* had been in all the clauses.

This case has been twice decided by the Court of Session. In the year 1803 there was a cause in the Court of Session, Sir William Elliott against the heirs of entail of Stobbs; it was a question *inter heredes*, and not a question between strangers, but that does not make any difference as to the point, whether the deed of tailzie is intelligible; it may make a difference as to the other question in this appeal. The case, after stating the deed of entail of the 17th of September 1718, which is the deed of restriction now under consideration, stated that Sir Gilbert made up new titles to his estate, on the footing of his entail, in 1719 and 1720, upon which he and his eldest son were infeft. The entail was recorded in 1724, and Sir Gilbert possessed the lands upon these titles till his death in 1764. He was then succeeded by his eldest son Sir John, who possessed the estate upon the titles made up in his father's lifetime, and died in 1767, being succeeded by his eldest son Sir Francis, who also made up titles in terms of the entail; and, upon his death in 1791, Sir William succeeded, and made up his titles under the entail as his predecessors had done, on which titles he has ever since possessed the estate. In the year 1801 Sir William entered into a minute of sale with Mr. Joseph Gillon, writer in Edinburgh, of a part of the estate. Mr. Gillon suspended the payment of the price, on this ground, that Sir William had no power to implement the minute of sale on his part, being restricted from selling by the

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entail of Stobs. The bill of suspension was passed of consent. Then there arose another cause. Sir William brought actions of reduction and declarator of the tailzie and subsequent investitures, calling as defenders all the heirs of entail in existence. There is a mode of proceeding in Scotland which we do not adopt in this part of the kingdom, that is, that where persons conceive themselves entitled to certain estates, they bring an action of declarator, when no persons dispute it, against all those who may choose to oppose their claim; and there certainly is great convenience in this practice. The Courts of Scotland are very much attached to this mode of proceeding; whereas our courts of justice are very much in the habit, when they find that the proceeding is to settle a question which cannot be said strictly to have arisen between the parties, to refuse to give any decision whatever upon it. Within my own recollection in practice this House has been called upon to decide, and has occasionally decided in similar cases. Formerly contracts used to be made for sales of estates. Bills were filed in the Court of Chancery for the specific performance of the contracts,

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that if there was considerable doubt with respect to a title, he would not compel the purchaser to take. Mr. Baron Eyre, (afterwards Lord Chief Baron, and Lord Chief Justice Eyre,) I remember, was a good deal shocked, because he was of opinion there could be no such thing as uncertainty in the law; and he did not approve of that decision. But it has since been taken for granted, that if there is serious doubt of the title, whatever might be the law before, the Court will not compel the party to take the title, and so that mode of proceeding appears to have been very much discussed in the courts of justice in England.

In the result of this action of declarator, Sir William maintained this separate plea, "that the
"entail was ineffectual to prevent a sale, being
"defective in its various clauses, in support of which
"he maintained that the limitations of an entail
"are not to be extended by inference or implication
"beyond what is expressed in the entail itself (a
"proposition to which full assent will be given);
"and wherever these limitations are directed against
"third parties, as in the case of a prohibition to sell
"or contract debt, in order to render these effectual
"against purchasers or creditors, it is necessary that
"the prohibitory and irritant clauses should be
"accompanied by a resolute clause making void
"the right of the contravener." Then cases are mentioned. "The irritant and resolute clauses,
"besides, must be precisely applicable to the act of
"contravention, in order to be effectual against
"third parties," and Bruce of Tillycoultry's case is cited.

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In this case it is said "the irritant and resolutive clauses, instead of bearing in general that all the acts of contravention contained in the prohibitory clause shall be void and null, or shall subject the heir to a forfeiture, specially enumerate the various cases to which they are meant to apply." That would be more accurately put if it was stated that after the declaration, that they are not to contravene in any respect the provisions contained in the instrument, it enumerates various cases to which such contravention would extend. They say, further, "That in order to render void an act of contravention it must be done by Sir Gilbert and the heirs,—it must be done by the heirs during their respective marriages,—and it must be such as to burden or affect the estate, and infringe or alter the succession. But to enter into a minute of sale does not fall under any of the cases enumerated as qualified and explained by the irritant clause, in which cases alone contravention of the entail can be effectual against third parties. The prohibition to sell, analzie, wadset, dispoone, dilapidate, and put away the said lands, is most ample —

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“ **female, their husbands and children, none of which**
 “ **Sir William is; at least, if it does not, this clause**
 “ **is so uncertain as to be insufficient for imposing**
 “ **fetters, which can only be done by clear expression**
 “ **to affect the rights of purchasers and creditors.**
 “ **Again, the disposition must be granted in concur-**
 “ **rence with Sir Gilbert himself, ‘ who, whether male**
 “ **or female, and I ;’ and it can only take place in**
 “ **case they concur to dispoise the estate, but does not**
 “ **take place in any of the other ways by which the**
 “ **estate may be alienated ; e. g. by a minute of sale.**
 “ **The statute 1685 distinguishes between selling,**
 “ **analzieing, and dispoising, as being different modes**
 “ **of affecting property. Selling or analzieing, there-**
 “ **fore, by a minute of sale, is different from dispoising,**
 “ **and the minute of sale may be completed by the**
 “ **purchaser adjudging in implement.”** I read this,
 because it appears to me that the substance and mar-
 row of the argument is contained in these pleadings.

On the other hand, the answer appears to me to
 contain the substance of all that has been stated at
 the bar on the other side. The act of 1685, per-
 mitting proprietors to entail their property, has
 prescribed no form of words which shall be essential
 for carrying the entailor’s intention into effect, nor
 have the decisions of the Court as yet supplied the
 deficiency. It is only necessary that the clauses
 should be clearly and distinctly expressed, so that
 the meaning of the entailor may be carried into
 effect, without resorting to any constrained or vio-
 lent construction of the words.

In *Bruce v. Bruce**, the entail of Tillycoultry,

* 15 Jan. 1799. Dict. 15539.

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among other prohibitions, contained one directed against selling, analzieing, dilapidating, or putting away the foresaid lands or estate. The resolute clause did not contain a general reference merely to the various prohibitions as the irritant clause did, but proceeded to a special enumeration of the acts of contravention, which would forfeit the contravener's right, thus limiting and circumscribing the effects of the general reference. Among those acts of contravention the whole clause *de non alienando* was omitted, and no words which could apply to it were inserted. The strict interpretation of entails will probably not be carried farther than it was there. The present question, however, is one very different. On examining the enumeration of cases to which the irritant and resolute clauses of the estate of Stobbs are meant to apply, the first part of them refers to the prohibitions with regard to the entailer's surname, title, and arms, and with regard to the heir-female and their husbands and children using the same surname, title, and arms. Then, as the heir of entail, as well as the entailer, were prohibited from alienating, contracting debt, or altering the

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when connected with the words, "whether male or female, and I shall dispone," it can relate to no others than the heirs of entail, as the heirs of entail, male and female, and the entailer himself, had been prohibited from alienation. Nor is the irritancy confined to a deed of an heir, in concurrence with the entailer ; that depends certainly upon the whole extent and meaning and construction of the clause. The entailer, by the construction of the tailzie, became a life-renter, and no prohibition against him was necessary ; and if he had not, he could not have irritated his own deed, or deprived his creditors of the means of attaching his estate, so long as he continued proprietor of it, so that the addition *and I* to the various clauses is unnecessary, and should be held *pro non scripto*. The intention of the entailer is obvious. The clause itself begins thus, "If I, or any of the said heirs." Afterwards, when *and* is used, it is used as being synonymous with *or*, which, in common language, it frequently is. Again, the irritancy is applicable to a sale of the estate, as disposing is one of the acts specially enumerated, making this case thus far different from the case of Tillycoultry. Selling, however, it is said, is not included under the general term to dispone. But these words are synonymous ; they are different modes of expressing the same act, and, together with *analzie*, are so used by the statute of 1685. Perhaps, of all the terms, sell, *analzie*, wadset, dispone, dilapidate, and put away, used in the prohibitory clause, *dispone* is the most general, and it is therefore used as an equivalent to them. What this House has found in other cases as to the effect

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of the word *dispone* I need not remind you. The question which arises is not whether in many cases the meaning of the word *dispone* may not be to sell, but whether it is so in this case, taken in the way in which it stands here. The irritant clause continues, "Then, and in any of these cases, not only shall all such deeds and contraventions to be done by me and the said heirs male or female,"—this first part applying to such prohibitions as are directed against the entailer or the heirs of entail; and then proceeds,—"or any of them, during their respective marriages," comprehending the other class of contraventions as to the name, arms, and title which are to be borne by the heirs-female and their husbands, and which prohibitions are contradistinguished throughout every clause in the entail. All these are irritated, so far as they burden and affect the estate, which last term is sufficient to include the sale in question.

Mr. Solicitor-General Blair and Mr. Ross were concerned as counsel in this cause; and the Court of Session were of opinion, which they expressed on the 10th of May 1803, both that this clause was

Session upon precisely the same points ; and if they were of opinion that a man cannot sell, they must be of opinion a man cannot buy. The question therefore, upon the whole, appears to be this, Whether the opinion of the Court of Session in 1803, or the opinion of the Court of Session in the present case, is the better opinion? It appears to me to be reduced to two points ; namely, whether this deed is intelligible ; and if this deed be intelligible, what is the effect of it with respect to the sufficiency of the three respective clauses. Now it is a very dangerous thing to come to a decision that an instrument is not intelligible which has been so far the subject of judgment ; and though one cannot help seeing that almost every rule of grammar is sacrificed in this deed, yet, if we were to hold this to be unintelligible, I cannot conceive how it can be said to have been satisfactorily determined unless it was understood. I am of opinion this instrument is an instrument capable of being understood, and that reduces it to the question, What is the effect of the word *dispone*, regard being had to the whole context of this instrument? After the decisions which have been come to upon the word *dispone*, and after (what is of infinitely more weight) the great authority to be found in the law of Scotland, antecedent to any such decision, as to the effect of the word *dispone*, I cannot help stating it, after much consideration of the case, as my judgment, that this word *dispone* in these other clauses is quite sufficient for the purpose of protecting this entail ; and unless any of your Lordships are of a different opinion, it appears to me that this judgment must be reversed.

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Ordered and adjudged, That the said interlocutor of the Lord Ordinary of the 27th of January and the 19th of February 1813, complained of in the said appeal, be and the same are hereby reversed: Further ordered and adjudged, that the said interlocutor of the Lord Ordinary of the 17th December 1813, also complained of, be and the same is hereby reversed; except so much thereof as finds that the case in question having been granted in consideration of a grassum for a period of 77 years, was to be considered as an alienation; and as finds that alienations were prohibited by the entail of the estate of Stobs: Further ordered and adjudged, that the said interlocutors of the Lords of Session, of the 1st division of the 17th of February and 10th of March 1814, also complained of in the said appeal, be and the same are hereby reversed: and the Lords find, that according to the true construction of the deed of entail of the estate, the prohibition to dispose extends to the lease in question, and that the irritant and resolute clauses in the same deed of entail do so refer to the specific prohibition to dispose, as to render the same effectual against third parties, and therefore sustain the reasons of reduction of the lease in question: Further ordered and adjudged, that the said cross-appeal be dismissed, and that the said appeal be allowed.

ENGLAND.

(COURT OF CHANCERY.)

The UNITED COMPANY of MER-
 CHANTS of ENGLAND, TRADING } *Appellants;*
 to the EAST INDIES - - - - }

ROGER KYNASTON, Esq. - - - *Respondent* *.

The Respondent, an impropriate rector, having by a decree of the Court of Chancery been found to be entitled (under the decree made in pursuance of the act 37 Henry VIII.) to the tithes, according to the value, of warehouses in London, occupied by the Appellants, and which never had been rented, the Court has jurisdiction to make an order upon the Appellants to permit inspection, for the purpose of ascertaining the value.

Such an order cannot be executed by force, but operates only on the person, as a foundation for process of contempt, and to take the Bill, *pro confesso*, if necessary.

THE Respondent, the impropriator or impropriate rector of the parish of St. Botolph without Aldgate, part whereof lies within the city of London, or the liberties thereof, being entitled to the tithes of that parish, in the month of July 1804, filed his bill of complaint in Chancery against the Appellants, who were in possession, as the owners and occupiers of certain warehouses and other premises situate in Gravel-lane, Petticoat-lane, Harrow-alley, Cutler's-street, and Parker's-gardens, within that

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* See this case upon the hearing in the Court below, 3 Swan. 248.

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part of the parish lying within the city of London. The bill prayed that an account might be taken of the several sums of money due and owing to the Respondent from the Appellants, in respect of the tithes, rates for tithes, sums or customary payments, or other duties in lieu of tithes, on account of the warehouses and other premises held or occupied by them within such part of the rectory or parish of St. Botolph as aforesaid, or the titheable places thereof, in each year since the said month of May 1804, and that the Appellants might pay to the Respondent the money which should be so found due from them on the taking of such account. The Respondent, by the bill, setting forth a certain decree duly inrolled in the said Court of Chancery, bearing date on the 23d of February 1545, and made by Thomas, then Lord Archbishop of Canterbury, and others, in pursuance of an Act of Parliament passed in the 37th year of the reign of Henry VIII, intituled, "An Act for Tithes in London," and charging that the tithes payable by the Appellants in respect of their premises, and the amount of the several sums to be paid by them, ought to be com-

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“ any part thereof under any yearly or other rent,
 “ or for any consideration in the nature or in lieu of
 “ rent, and that no yearly or other rent had at any
 “ time been paid for the said warehouses or ground.
 “ That as to all the warehouses then in the occupa-
 “ tion of them the Appellants, (except some ware-
 “ houses called Rumball’s, about which at present
 “ there is no question,) thereinbefore mentioned to
 “ be situate within that part of the said rectory or
 “ parish which is within the said city of London
 “ or the liberties thereof, the Appellants never
 “ having held the same at or subject to any rent,
 “ and no part thereof having been let since they
 “ were built, they the Appellants were unable to set
 “ forth as to their knowledge what was the then
 “ actual value thereof.”

The bill was afterwards amended, and the Ap-
 pellants put in a further answer, the Respondent
 replied thereto; and the cause, being at issue, came
 on to be heard on the 2d day of March 1818,
 before the Master of the Rolls, when his Honor
 declared, “ That the Respondent was entitled,
 “ among other things, to tithes after the rate of two
 “ shillings and nine pence in the pound upon the
 “ annual value of all the messuages, warehouses, and
 “ other premises held or occupied by them (the
 “ Appellants) within the said parish of St. Botolph
 “ without Aldgate, in the city of London, except
 “ the said premises called Rumball’s warehouses;
 “ and he did order and decree that it should be
 “ referred to Mr. Thompson, one of the Masters
 “ of the said Court of Chancery, to ascertain the
 “ value of the premises, except as aforesaid, and to

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" take an account of what was due to the Respon-
dent for tithes at the rate aforesaid ; and that the
Appellants should pay to the Respondent, what
should be reported due to him on taking of the
said account, together with the costs of the said
suit."

In pursuance of this decree, interrogatories on behalf of the Respondent were, in or about the month of November, carried into the office of the Master, for the examination of the Respondent's witnesses as to the value of the warehouses and other premises above mentioned, and three witnesses were then examined on his behalf, namely, Mr. James Burton, William Montague, and Joseph Kaye. In the course of the following December, interrogatories were carried into the Master's office on the part of the Appellants for the examination of witnesses on their behalf, upon which Mr. Dennis Chapman, Mr. John Shaw, Mr. William Pilkington, and Mr. S. P. Cockerell were examined.

All the persons who had been so examined on the part of the Respondent were surveyors or architects, and, together with those examined on the part

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Respondent laid before the Master, in addition to the evidence of the surveyors, the evidence of some experienced warehousemen and wharfingers, whose practical acquaintance with, and knowledge of, the value of premises similar to those, which were the subject of the above inquiry, might assist the Master in forming a judgment upon the matter referred to him.

With this view, the other depositions not having been published, publication was enlarged at the instance of the Respondent, and it was proposed on his behalf to examine two experienced warehousemen, who were stated to be peculiarly well qualified to furnish the Master with practical information; and in order that the testimony of those persons might be as full as possible, application was made on behalf of the Respondent to the Appellants, that those two witnesses might be permitted to inspect the interior of the warehouses in question, preparatory to their being examined.

With this application the Appellants refused to comply, although the other witnesses, who had before been examined, had been permitted to have an inspection of the premises previous to their examination; the Respondent therefore applied to the Court of Chancery for an order upon the Appellants to grant such inspection.

This application was made by motion before the Vice-Chancellor, on the 6th of February 1819, supported by the affidavit of Richard Grose Burfoot, the Respondent's solicitor, when his Honor ordered, "That it should be referred to Mr. Thompson, the same Master to whom the cause stood referred, to

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" inquire, and state to the Court whether an inspection of the several warehouses and premises before mentioned to be in the occupation of the Appellants in Gravel-lane, Petticoat-lane, Harrow-alley, Cutler's-street, and Parker's-gardens respectively, by the said Joseph Sills and Robert Smith, (in the said order, by mistake, called William Smith,) preparatory to their being examined as witnesses upon interrogatories carried into the said Master's office by the Respondent, in pursuance of the decree made on the hearing of the said cause, the 2d day of March 1818, (and which is the decree hereinbefore stated,) was necessary for the said Master to form his conclusion upon the matters thereby referred to him; and after the said Master should have made his report, such further order should be made as should be just."

The Appellants were dissatisfied with this order; and accordingly applied by motion to the Lord Chancellor to discharge it; but he being of opinion, after argument, that the order was right, refused the motion.

Pending these proceedings before the Lord Chan-

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“ of the said affidavits, and of what had been
 “ alleged before him by the solicitors for the said
 “ parties, of opinion that an inspection of the seve-
 “ ral warehouses and premises hereinbefore men-
 “ tioned to be in the occupation of the said
 “ Appellants, in Gravel-lane, Petticoat-lane, Har-
 “ row-alley, Cutler’s-street, and Parker’s-gardens
 “ respectively, by the said Joseph Sills and Robert
 “ Smith, preparatory to their being examined as
 “ witnesses upon the interrogatories exhibited by
 “ the said Respondent before him for the examina-
 “ tion of witnesses, in respect of the matters referred
 “ to him by the said decree of the 2d of March
 “ 1818, was necessary for him to form a satisfactory
 “ conclusion upon the matters referred to him by
 “ the said decree.”

This report having been filed, the Respondent
 preferred a petition unto the Lord Chancellor, pray-
 ing that the report might be confirmed, and that the
 aforesaid Joseph Sills and Robert Smith might be
 at liberty forthwith to inspect the several warehouses
 and premises.

Upon the 7th of April 1819, this petition came
 on to be heard before the Vice-Chancellor, when
 counsel for the Respondent attending accordingly,
 and no one attending for the Appellants, although
 they had been duly served with a copy of the said
 petition, and his Lordship’s order made thereon, as
 appeared by affidavit then produced and read, the
 Court ordered, “ That the said Master’s said report
 “ should be confirmed. And it was ordered that
 “ the said Appellants should permit the said Joseph
 “ Sills and Robert Smith to inspect the said several

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“ warehouses and premises in Gravel-lane, Petticoat-lane, Harrow-alley, Cutler’s-street, and Parker’s-gardens respectively, preparatory to their being examined as witnesses upon such interrogatories as aforesaid.”

The East India Company then presented a petition of Appeal to the Lord Chancellor, stating themselves to be aggrieved by the said two several orders of his Honor the Vice-Chancellor, bearing date the 6th day of February and 7th day of April, 1819, and by each of them, and praying that the same might be reversed.

On the 4th day of May 1819, upon the hearing of the petition, the Lord Chancellor affirmed the two orders of the Vice-Chancellor.

From these three orders, bearing date respectively the 6th day of February, 7th day of April, and 4th day of May 1819, the appeal to the House of Lords was presented.

For the Appellants:—

The occupiers of private dwelling-houses, warehouses and premises, are by law entitled to the ex-

that any instance can be found ; but, on the contrary, it is admitted that no instance can be found in which the Court of Chancery has ever heretofore assumed or exercised any such authority.

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For the Respondents :—

It was competent to, and within the authority of the Court of Chancery, in such a case as the present, to require and compel the Appellants to allow the witnesses of the Respondent to survey and inspect the premises in question :

An inspection of the interior of the above-mentioned premises by Joseph Sills and Robert Smith, previous to their being examined, is necessary, in order that their evidence may be complete and satisfactory, and that the Court may have such full information as is essential to enable it to form a correct judgment, with respect to the true value of these premises :

It is apparent, that unless the witnesses on both sides, in cases like the present, are permitted to have such inspection as is here sought, the Court will in effect be obliged to determine all such cases upon evidence adduced on one side only, and by that party which is most materially interested in depreciating the premises, which are the subject of inquiry, below their real value.

For the Appellant, *The Attorney General,*
Serjeant Bosanquet, (and *Mr. Wyatt.*)

For the Respondent, *Mr. Wetherell, Mr.*
*Ralph Palmer**.

* The arguments were in substance the same as upon the hearing in the court below. 3 Swans. p. 248.

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The Lord Chancellor, in the course of the argument, asked whether, in case of an agreement between landlord and tenant, that the value of timber used in repairs should be allowed at the end of the lease, a right would not exist, and, as incident to the right, a power in a court of equity to compel inspection for the purpose of valuation; and it being observed, in answer to this question, that the right and power in the case supposed, would arise out of contract, he asked whether the act of parliament was not a contract for all parties. The reason (he observed) why all these suits were brought into equity was, because the lord mayor's court was unable to deal with them.

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Lord Redesdale, after stating the bill and answer, the order in question, and the proceedings upon it, made the following observations:—

The question is, whether the order of the 7th of April 1819 can be supported. The ground stated for the Appeal is, that this is a private dwelling-house, and that the occupier is entitled to exclusive possession,—that no adverse entry can be made but

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ported his inability to form an opinion of the value of the premises, without such inspection as the order requires; and how otherwise is it possible to judge of the value? If there are no means to form any judgment upon this subject, the Court would have no power effectually to execute the decree which has been pronounced in the cause. The result of this state of things would be, that the East India Company would be their own valuers, and the question in the cause must be decided upon evidence furnished by one of the parties to the exclusion of the other. The objection, upon the face of it, appears to be unreasonable.

The arguments urged for the Appellants at the Bar are founded upon the supposition, that the Court has directed a forcible inspection. This is an erroneous view of the case. The order is to permit; and if the East India Company should refuse to permit inspection, they will be guilty of a contempt of the Court, in which case, being a corporation which cannot be affected by personal process, a sequestration issues against their goods, to compel obedience to the order, or, as a preliminary step, to authorize the Court to take the bill *pro confesso*. So it is in the case of insufficient answers, and other proceedings of a suit in equity. The bill cannot be taken *pro confesso*, until the process against the person for contempt has been exhausted. In this case therefore, if the order to permit inspection be erroneous, and not the subject of process for contempt in case of disobedience, the bill cannot be taken *pro confesso*, and the justice of the Court is defeated. In the argument much reliance seems to

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have been placed on Semayne's Case*, which may be considered as the foundation of the objection. But there the question was collateral. It was an action upon the case against a surviving partner, for obstructing the execution of a writ of extent, issued upon a recognizance in the nature of a statute-staple, by shutting the door of his house against the sheriff and jury, who came to extend the goods of the deceased partner. According to one of the resolutions in that case, the sheriff has not authority by law to break open doors to execute process at the suit of a subject, although request be made, and admission to the house refused; and the substance of the reason given for this resolution is, that it would be attended with danger to the public peace. Whether this reasoning stands on a solid ground may be questioned.

On process at the suit of the Crown, where goods are fraudulently removed, and in cases of replevin, the doors of a house may be broken by the sheriff after request and denial. In the latter case the power is given by statute. But how can that reasoning, though ever so well founded, impeach

It was suggested, in argument for the Respondent, that as courts of equity assist the courts of law to arrive at a judgment in a cause, so by analogy they might assist them in the execution of the judgment upon a *fiery facias*, or otherwise. But this notion is founded upon a mistaken view of the practice of equity. The assistance given to courts of law by courts of equity is to remove legal impediments, as a nominal title in a third person; and this interference is necessary, because the courts of law have no power to remove the impediment. To assist the execution of a writ of *fiery facias* would be to make a new law in courts of equity. They proceed always indirectly by process of contempt, in all cases except where the decision is upon a title to land, in which excepted case they decree possession, and direct the sheriff to execute the decree.

What was the origin of the power of the Court, it might be difficult to determine. It now stands upon usage, and is not confined to cases precisely similar to those which have preceded, but is adapted to emergencies to make the jurisdiction of the Court effectual.

Courts of equity giving judgment on the peculiar subject of their jurisdiction in cases of trust or fraud, or other cases, direct possession to be given, or direct tenants to attorn and pay rents, or compel the specific execution of agreements. In case of chattels, they frequently order specific delivery of the article demanded, but enforce their decrees and orders only by process of contempt. In the case of the silver altar*, which depended on the peculiarity rather than

* *The Duke of Somerset v. Cookson*, 3 P. W. 390.

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the intrinsic value of the thing, a jury could not have given an appropriate remedy in damages. In such cases courts of equity enforce obedience by process of contempt, and never, but in the excepted case of a decree for land in a judgment upon title, direct the sheriff to take and give possession by force.

In the case of realty, the Court orders the failing party to deliver possession. If he disobeys the order, the sheriff is directed to put the party in possession, for whom the decree is made. In the case of personal chattels, the Court operates on the person by process of contempt, and effects the end indirectly, which, according to their practice in such cases, is not permitted to be done *per directum*.

In this case the substantial question is, whether such a power in the Court is not necessary for the purposes of justice. It is objected that it is new practice, and that there is no case to be found which warrants it; but the case of *Lord Lonsdale** is directly in point, and much stronger than the case now before us for decision.

This is a case where a plaintiff has a claim for a payment out of property, according to its value;

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that the plaintiff had no right. But in this case his right is ascertained. The only difference (which is immaterial) is, that in that case it was a mine, in this a house ; but both are equally private property. In that case the result of the inspection was, a discovery that coal to the amount of 3,000 l. had been taken away from Lord Lonsdale. If the practice of the Court had depended on the will of the party, the defendant in that cause would not have permitted inspection by any person but his own agents. Such an order was made in that case, and there was no appeal against it. So in the case of Lord Byron*, the order was in effect mandatory. But if this had been the first instance, it would not be a substantial objection ; for if so, every order made for the first time might be resisted on that ground

The Lord Chancellor :—This appeal is brought before the House, in consequence of a strong impression on the mind of Sir Arthur Pigott, who always misunderstood the order. After the Vice-Chancellor had referred it to the Master, to consider whether it was necessary that inspection should be had, and the motion was made before me to discharge that order, I suggested that the order should not be imperative to inspect, but on the defendants to permit inspection. That suggestion was adopted by the Vice-Chancellor in the order subsequently made, which is now the subject of appeal. This is necessary to be noticed, on account of the reasons appearing in the Respondent's case. That course, I apprehend, is at all events lawful. If the defendants refuse to permit inspection, the Court will then have

* 1 B. C. C. 588. See also *Lane v. Newdigate*, 10 Ves. 192.

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to consider what ought to be done; whether they will compel the inspection, and how. No such order has yet been made, but the Court can find the way to do complete justice. The time may come, when the defendants may be of opinion that the order is beneficial to them. I do not at present intimate what I mean; it is sufficient to say, that the means of enforcing what is due to justice can be found.

9th March, 1822.

Ordered and adjudged, That the said Petition and Appeal be dismissed this House, and that the said orders therein complained of be confirmed.

THE memory of the case mentioned by Lord Redesdale in the text, p. 166, had almost perished in the Profession. The attornies and agents of Lord Lonsdale in the cause were dead, and all the Counsel, except Lord Redesdale, to whose kind condescension the Reporter is indebted for furnishing a clue to obtain the following account of the case, extracted from the Register's Book.

The Earl of Lonsdale v. J. C. Curwen, Esq.

1799. In this case the Earl of Lonsdale had filed a Bill against J.C. Curwen, Esq. by which, and the affidavit of John Walker, it appeared that the Earl of Lonsdale was seised of the manors of Sooton and Stainburn, and certain closes called the

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to be extended and carried into and under the closes called the Clossoks for the length and space of 40 yards and upwards; and also caused large quantities of coal to be dug out and taken from under the closes called the Clossoks, to the amount of 600 waggon, or 2,100 tons, of about the value of 300*l.* or upwards: that having been directed by Mr. Curwen to extend the workings farther under the Clossoks, he had remonstrated with Mr. Curwen against his doing so, on which Mr. Curwen had engaged one Edmund Bownass, who had the direction of the E. of L.'s collieries at Clifton, about two or three miles from Workington, to take the charge and direction of the working under the Clossoks; that E. B. afterwards proceeded to have the workings carried on under the said closes to the extent of about 212 yards in length, and in breadth to an average of about 105 yards, and that in consequence of such workings the greatest part of the coals which had been raised at the John Pit for the preceding two years had been dug out of and from under the Clossoks, amounting to 6,000 waggon and upwards, of the value of 3,000*l.* and upwards, over and above the 300*l.* before mentioned: that Mr. Curwen, about the 13th of Aug. then last, gave orders and directions to the workmen employed in the workings under the said closes to rob or take away several of the pillars which had been left for the carrying on the workings, and which they had ever since been and then were doing, by which means the workings would be destroyed, and it would be rendered impossible for any person to discover the extent of the workings, or the quality of the coals dug and taken away thereout: That Mr. Curwen, in a conversation with John Walker about taking away the coals under the said closes, and the danger of a discovery thereof, asked him whether he (Mr. Curwen) could not drown the workings by letting the water out of his own collieries into the workings, which would prevent any discovery thereof from ever being made, which deponent said he, (Mr. Curwen) might do; on which Mr. Curwen directed him to go on: That Mr. Curwen, by letting the water out of his own collieries into the workings would ruin and destroy the workings of very large quantities of coal belonging to the E. of Lonsdale, to a very large and almost inestimable amount. It also

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appeared by affidavit of J. B. Garforth, that the Plaintiff was soiled, &c. and that the Defendant, without permission, was then digging, and carrying away coal from under the lands against the will of the Plaintiff.

The bill prayed an injunction to restrain the Defendant, his servants, &c. from digging or getting coal in or under any of the premises in question, or any part thereof, and particularly from robbing or taking away the pillars which had been left in the workings, and that the Plaintiff, his, &c. might be at liberty to inspect the workings of Defendant under, &c.

10th April 1799

Upon a motion for the purpose expressed in the prayer of the bill, it was Ordered, that an injunction should be awarded to restrain the Defendant, his servants, &c. from digging or getting coals in or under any of the premises in question, or any part thereof, and from carrying on any workings, and in particular from robbing or taking away the pillars which had been left in the workings under the Plaintiff's parcels of land in question, until the, &c. and that the Plaintiff, his servants, &c. should be at liberty to inspect the workings of the Defendant under the Plaintiff's inclosures called the Clossaks—Reg. Lib. A. 1798, p.

7 June 1799.

By an order, dated the 7th June 1799, reciting the foregoing order of the 20th April 1799, and that it was alleged that John Howard, &c. as agents on behalf of the Plaintiff, on the 20th of April, had proceeded to inspect the workings of the Defendant in, &c. but were prevented from completing such inspection, because the pipe or air-course which

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that it was prayed that the Plaintiff, his servants, &c. might be at liberty as often as should be necessary to make further other inspections into the workings of the Defendant, under, &c.; and that in order to enable the Plaintiff, his, &c. so to inspect the same, the Defendant might be directed to restore the several air-courses theretofore used, and existing within the colliery, and to remove the earth, &c. lying at the ends, roads and passages leading to the workings; and that the Plaintiff, his servants, &c. might also be at liberty to use all necessary means to ascertain the workings and the extent thereof: It was ordered that certain persons named in the order should be at liberty to view the mine, and that such persons as the viewers might think proper to appoint, should attend such viewing of the mine; that the Defendant should cause the obstructions to be removed, and open the air-courses as the viewers should think necessary for such inspection; and that the viewers, and such other persons as they should appoint, should be at liberty as often as should be necessary, to make from time to time inspections into the workings of the Defendant under the premises of the Plaintiff, so as to enable the viewers to make a perfect and complete report of the workings.

No further notice of this case occurs in the Register's Book; and according to information communicated by Lord Redesdale, the case was compromised by the payment of a large sum for the coals taken from under the grounds of Lord Lonsdale.

The practice in Courts of Equity of granting orders for inspection of mines, machines, &c. is well settled. But no notice has ever been taken of the point in the books of practice, and no authorities are to be found upon the subject in the Reports of Cases in Equity; except the case in the Court below, of *Kynaston v. The East India Company*, as reported 3 Swan, 248, and upon Appeal to the House of Lords, now reported in the text, and which case, as it relates to warehouses, is distinct from former authorities, and new in its kind. Two cases of orders for inspection extracted from the Register's Book are therefore subjoined.

Walker and others v. Fletcher and others.

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In this case it appeared from the allegations of the Bill, supported by affidavits, that the plaintiffs being possessed of divers mines of coal at, &c. which they had for a long time (then) past wrought in copartnership; and that John Harris then was seised in fee, in trust for all the plaintiffs, of a close of land (with the mines of coal under the same), which at the east end abutted on a certain close belonging to the defendant John Fletcher, called the Seggs, and on the south side on another close called Flowered Moss; and that the Defendants had begun to work the same: That there was under the close belonging to the Plaintiffs, called Flowered Moss and the other closes, called Flowered Moss and the Seggs, a mine or vein of coal of very considerable value; and that the Defendant John Fletcher, together with the Defendants Joseph Steel and John Wilson, then were, and for some time then past had been carrying on and working divers collieries and coal-mines in copartnership; and the Defendants as such copartners, or their servants and workmen, about three years before, had sunk a coal pit and erected a fire engine in the close of the Defendant John Fletcher, called the Seggs, at the distance of about 50 yards from the Plaintiff's close called the Flowered Moss, and had ever since worked the said colliery, and had carried on their works from the engine-pit to the rise of the colliery towards the Plaintiff's close: That the

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agents, had dug or taken such coals as aforesaid : That a few weeks after the sinking of the pit was begun by the Plaintiffs, the Defendant Steel was present, and declared that the Plaintiffs should never have a colliery or pit there, or to that purport or effect : That every means to prevent the same had since been used by the Defendants, and when the defendants found that such their workings under the Plaintiff's close had been discovered, they caused part of such workings which laid near the pit sunk by the Plaintiff to be filed up, and also plugged the bore hole, and made barriers and walls in their workings under the closes called the Seggs and Flowered Moss, or one of them, and had filled the same with wood, earth, clay and other materials, and thereby prevented the water flowing from the coal under the Plaintiff's close, in such manner as it had before done, and the pit which the Plaintiffs had begun to sink and dig was thereby overflowed with water to the depth of four or five yards, so that the Plaintiffs were prevented from working in and sinking the same ; and the water also, by being so stopped, in part forced and extended itself to another colliery which the plaintiffs were working, and which was near a quarter of a mile from the Defendant's Seggs close, and was likely to extend much farther, and considerably to injure such last-mentioned colliery : That from the proceedings of the Defendants, which they still continued to pursue, and threatened to carry on to a much greater extent, unless such plugs, walls, dams and barriers were taken away, the plaintiffs were in great danger of losing the whole benefit and enjoyment of their mine or vein of coals under their close, and their workings in other places might and would be greatly damaged ; and the defendants by continuing to carry on their workings under the plaintiffs close had taken and got from under the same great quantities of coals of great value : That in order to discover, and if possible to prevent the proceedings of the Defendants, and the injury done thereby to the Plaintiffs colliery, the Plaintiffs had caused to be sunk in their close, the pit before mentioned, which was of the width of five feet, and of the length of seven feet ; that the nearest part of the pit was near six yards from the Defendants close called the Seggs ; and that when it had been sunk to about the depth of 32 or 34 yards, the Plaintiffs caused a perpendi-

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cular hole to be bored down to the coal, which was at the depth of 35 fathoms, or thereabouts, from the surface, and they found the coals at the bottom of such bore-hole entire; but having had reason to suspect, from the proceedings of the Defendants, and the observations and threats used by them shortly after the Plaintiff's pit was first begun, that the coal had been wrought and taken away within a very short distance of such hole, Jeremiah Harris and Joseph Muncaster, on behalf of the Plaintiff, requested leave of the Defendant John Fletcher, and also of the agents or workmen then attending the Defendant's colliery, that Jeremiah Harris, as coal agent of the Plaintiffs and other persons then present, and along with him, might be permitted to go down into the Defendant's coal mine and view the works, but the Defendant John Fletcher refused to comply with the application, unless Jeremiah Harris could show a legal authority to enable him to do so: That the Plaintiffs not being able to obtain a view of the Defendants colliery by means of such applications, the Plaintiffs caused an oblique hole to be bored in their pit, so as to strike the coal at a little distance from the perpendicular bore-hole, that the oblique bore-hole was made in the hollow works made by the Defendants under the Plaintiffs close called Flowered Moss, and was between five and six feet, or thereabouts, on the east side of such perpendicular hole, and when the boring rods in such oblique state had reached the depth of the coal, which happened on or about the 8th of September then last, the boring rods entered into the hollow working made by the Defendant under the Plaintiffs close, and four or five yards, or thereabouts, to the west of the

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the defendants, nor the quantities of coal the Defendants had taken from under the same: That the Defendants had then blocked up their workings, or some of them, under the Plaintiffs Flowered Moss close, by placing framed walls, earth, rubbish, or other works or inventions, to prevent the Plaintiffs and their agents having any access to the same, or making any discovery of the injury done by the Defendants to the Plaintiffs; that the mine or vein of coal under the Defendants Seggs close, and part of Flowered Moss close, belonging to the Plaintiffs which adjoined thereto, dipped to the south, and therefore inclined from the place where the Plaintiffs had sunk the pit towards Seggs close; and that such vein of coal was covered with a bed of coal-metal about eight yards thick, which was covered with a bed of stone about four yards thick, which beds of coal, metal and stone, also dipped in the same direction as the coal, and that the water flowed down sunk beds towards Seggs close: And that soon after the Plaintiff had bored the first-mentioned oblique bore-hole in the workings made by the defendants under the Plaintiffs Flowered Moss close, their servants or workmen, had put or caused to be put, a plug or plugs of wood and iron into such bore-hole; and also made or erected walls, fences or barriers in the drifts or workings, which they had filled with earth, clay, stones and other materials, with intent to make the same water-tight, and thereby prevent the water running down from the coal, and the water soon afterwards began to run, and did afterwards rise in the pit to the height of four or five yards, which was then dug down to just within the bed of stone only; that the Plaintiffs had since endeavoured to let the water pass the pit, and to sink the same to the coal, for which purpose the Plaintiffs had caused another oblique bore-hole to be bored near to the first-mentioned perpendicular hole; but when the boring-rods reached to the place where coal should have been, the Defendants, to prevent the Plaintiffs from drawing the rods, and in order to deprive the Plaintiffs of the use thereof, in sinking the pit deeper, fastened the end of the lowest rods used in boring the last-mentioned oblique hole with an iron fork or key, or other instrument or means, in the hollow works made by the Defendants under the pit so sinking by the Plaintiffs in their

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close, and had actually prevented the Plaintiffs and their workmen from drawing the boring-rods upwards, although a very considerable force had been applied for that purpose, and the boring-rods still remained, and were kept fastened by the defendants in the hole whereby the rods were wholly lost and rendered useless to the Plaintiffs, and the Plaintiffs could therefore no longer work in or sink the pit as they had intended by the usual and ordinary means pursued by them; and the defendants and their workmen had very lately put and placed several wooden machines, inventions or contrivances, called framed dams, in the hollow works leading out of their coal mines to the colliery and mine under the Plaintiffs close, or communicating therewith, by means whereof the water was dammed or blocked up, so far as the said inventions were capable of doing: And the defendants absolutely refused to pull down the walls, framed dams and barrier, and to permit the water to run as it did before; that in order to deter the Plaintiffs from proceeding further in sinking the pit, J. Fletcher the younger, the son of the Defendant Fletcher, had given notice to the Deponent, who was then employed by the Plaintiffs in sinking the pit, that the Defendants framed dams were then closed, and that whoever should be at the bottom of the Plaintiffs pit would be in danger of being blown up, and that he came to give notice of the danger, that if care was not taken they must abide by the consequence after such notice; that by stopping the water from running off, the Plaintiffs had been hindered a very long time, and been put to a very great additional expense in endeavouring to sink their pit to the bottom, and that

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dams so tight by wedging as to drive the whole of the water back into the Plaintiffs colliery; and they also threatened and intended to prevent the Plaintiffs from working the coals under their close called Flowered Moss, or whereby the Plaintiffs might be enabled to convert the coals under their Flowered Moss close aforesaid to their own use. And in conformity with the declaration of the defendant Steel, the Defendants had endeavoured and were using and daily pursuing every means in their power to deprive the Plaintiffs from deriving any benefit from their colliery, or from any means of discovering the extent of the injury done to the Plaintiffs by the proceedings of the Defendants and their workmen.

The bill was filed in 1804, praying that the Defendants, their servants and workmen, might be restrained by the injunction of the Court from digging or getting any coals from under the Plaintiffs close, or in any manner digging under the same; and might be ordered to pull down the walls, dams or barriers which they had erected in their workings, whereby the water was prevented from flowing from the coals and colliery under the Flowered Moss close as it did before: And that the workings of the Defendant might be restored to the same state and condition as the same were in before the walls, dams or barriers were made: And that the Defendants, their servants and workmen might be restrained by injunction from making any such erections, or stopping up their works, or otherwise preventing the water from flowing from the beds and veins of coal, and other beds and veins under the said close; and that proper persons to be appointed by the Plaintiffs might be allowed, on reasonable notice being given for that purpose to the Defendants, to inspect the workings of the Defendants under the close called Seggs close, or under or near to the close called Flowered Moss close.

On the 14th of December 1804, a motion was made to the effect of the prayer of the bill; upon hearing which, it was ordered, "That an injunction should be awarded against the Defendants, to restrain them, their servants, workmen and agents, from digging or getting any coals from under the Plaintiffs close in the pleadings mentioned, called Flowered Moss close, or in any manner digging un-

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“ der the same, until the Defendants should fully answer the
 “ Plaintiffs bill ; and this Court should make another order
 “ to the contrary; and the Defendants were to be at
 “ liberty to view or inspect the Plaintiffs Agill pit, Walker
 “ pit, and the pit in the plaintiffs said close, called the
 “ Flowered Moss, in the division of the Defendants lands,
 “ on giving a fortnight's notice in writing to the plaintiffs, or
 “ one of them, with the name and description of the person
 “ to view and inspect on the Defendants part. And it was
 “ ordered, that the Plaintiffs should be also at liberty to
 “ view and inspect the Defendants pit mentioned in the
 “ pleadings, on giving the like notice in writing to the De-
 “ fendants, or one of them, with the name and description
 “ of the person to view and inspect on the part of the Plain-
 “ tiff. And it was ordered, that the Defendant should
 “ remove the framed dams or barriers in their works, as
 “ the viewers should direct, who were to cause the same to
 “ be removed unless they should be of opinion that the col-
 “ liery would be thereby destroyed. And it was ordered,
 “ that the viewers or inspectors should be at liberty to
 “ replace such frames, dams or barriers, if they should think
 “ proper, without prejudice to any application the Plaintiffs
 “ might thereafter make, to remove them. And it was
 “ ordered that no alterations should be made by the Plain-
 “ tiffs or Defendants in their respective works till after the
 “ first view or inspection ; but so as not to prevent the regu-
 “ lar working of their respective collieries or mines. And
 “ the Plaintiffs were to be at liberty to attend each view or
 “ or inspection of the Defendant with a view or or inspector

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the Buckinghamshire lace net, as made by hand with bobbins on pillows, and in April 1811, obtained letters patent for the exclusive enjoyment and use of his invention in England, for the term of 14 years; that suspecting the defendants, who were manufacturers at Nottingham, of pirating his invention, the Plaintiff bought a piece of their lace, which from the circumstances of the beam-thread traversing diagonally across the work, which was peculiar to the Plaintiff's machine, it was sworn by experienced workmen must have been manufactured by a frame essentially similar to the Plaintiff's, with which they were acquainted, and that the lace so purchased was in all essential particulars exactly resembling the lace made by the patent machine of the Plaintiff; that the bobbins or brass jacks of the Defendant's machine, which had been shown to a witness, were exactly similar to the Plaintiff's, which were also peculiar to his patent machine, and never before used in other machines; that a *quondam* partner of the manufactory of the Defendants had explained to a witness the construction and workings of their machine, which according to that description was in all essential points precisely similar in construction to the Plaintiff's machine. These facts being alleged by the bill, and supported by affidavits, an injunction was granted on motion to restrain the Defendants, &c. during the remainder of the term of the letters patent from using the invention of the Plaintiff.—
Lib. Reg. A. 1814, 1495.

Reg. Lib. A. 1816.

Upon application to dissolve the injunction, the defendants having put in their answer, an order was made, that the Plaintiff should bring such action as he should be advised, and that in the mean time the injunction should be continued. The action (it appears) was tried, and failed partly for want of sufficient proof of the resemblance of the machines. Whereupon an application was made for an issue to try whether the Plaintiff's machine was an original machine for making bobbin lace or twist-net, or only an improvement upon any prior existing machine, and if original, whether the net manufactured by the Defendants was a piracy, which was refused; but the Plaintiff's undertaking to bring an action against the Defendants for infringing the patent right, it was ordered

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(on the undertaking of the Defendants) that they should admit on the trial, that since the trial of the former action they had made lace with the machines *inspected* by Mr. Bramah, &c.

It appears, therefore, that there had been an inspection of the Defendant's machine, and the solicitor for the Plaintiff has informed the reporter that such inspection was made under an order of the Court; but he has been unable to find it in the Register's Book. It appears by entries of two orders, on the 22d and 28th February 1817, that after the direction of the new trial, it was ordered on motion, that Mr. Millington, either alone, or in company with Mr. Bramah, on behalf of the Plaintiff, might inspect and see the model of the Plaintiff's machine, marked according to the specification inrolled by Plaintiff J. B. in pursuance of his patent previous to the ensuing trial in the Court of C. P. that Plaintiff should put the machine into a state to work, according to the specification inrolled, &c. and permit Mr. J. M. to see it work in that state on the succeeding morning.—Reg. Lib. A. 1816.

IRELAND.

(COURT OF CHANCERY).

COLCLOUGH - - - - - *Appellant.*STERUM AND OTHERS - - *Respondents.*

A PERSON purchasing lands under a decree is bound to see that the directions of the decree are observed.

Lands in strict settlement, with a power to grant leases, being subject to prior incumbrances, are, by a decree in a suit instituted by the incumbrancers, directed to be sold subject to the charges prior to the deed of settlement. Pending the suit, the tenant for life under the settlement grants leases not authorized by the power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges.

Held (reversing the decree of the Court below), on a suit by the remainder-man in tail, that the sale, subject to charges not warranted by the decree, is void.

Where considerable delay has occurred in the prosecution of a suit, costs are not to be given, although the decree is reversed.

SIR Vesey Colclough, upon his marriage in 1767, being tenant in tail of a manor and lands called Tintern, &c., subject to portions, &c., conveyed them by deeds of lease and release to a trustee in fee (subject to a term of one thousand years thereby created) to the use of himself for life, remainder to the sons of the marriage successively in strict settlement. The incumbrances then affecting the estates, according to a covenant in the settlement, did not exceed 14,000 l. The

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term was created for the purpose of raising 3,000 *l.* according to the appointment of Sir Vesey Colclough, and the trustees of the term had a discretion to raise a further sum of 3,000 *l.* for the use of Sir Vesey by sale or mortgage; and it was provided, that the interest of the existing incumbrances, and of the two sums of 3,000 *l.*, when raised, should be paid out of the rents and profits of the estates by the trustees of the term, and that Sir Vesey and the successive owners of the freehold for the time being should receive the residue of the rents and profits. By the settlement, a power was given to Sir Vesey of leasing for three lives, or 31 years, in possession, &c. for the best rent without fine, &c.

In July 1767, the deed was registered, and a fine levied according to covenant. The Appellant was the eldest and only surviving son of the marriage. The two sums of 3,000 *l.* were raised under the power, and paid to Sir Vesey; but the trustees of the term permitted Sir Vesey to receive all the rents of the estates, and omitted to pay the interest upon any of the incumbrances affecting the estate.

In 1772 a bill was filed in Chancery in Ireland

the yearly value of the lands, and the parts most proper to be sold. The incumbrances were accordingly ascertained; but the yearly value of the lands, and what parts were most fit to be sold, were not stated in the report.

In August 1778 Cæsar Colclough was appointed receiver, in the suit instituted as before mentioned, to raise the sums charged upon the lands.

In 1780, by the final decree in the cause, the incumbrances mentioned in the report, amounting to 25,000 £., great part of which was an accumulation of interest, were declared to be charges on the estates comprised in the settlement of 1767, which settlement was recited in the decree; and it was decreed that those incumbrances should be paid, or that the lands should be sold for payment. Pending the suit to raise the prior incumbrances, annuities charged on the lands for the life of Sir Vesey, and leases not authorised by the power, were granted by Sir Vesey to Cæsar Colclough, the receiver in the suit.

In 1781 the lands were set up to sale in the Master's office, subject to the annuities, and the leases, and were purchased by Thomas Richards. The deed by which the lands were conveyed to him recited the grants of the annuities, and that the lands were sold subject to them.

At the date of these transactions the Appellant was an infant. Sir Vesey, his father, had been appointed and acted as his guardian, and among other things signed, in his name, the deed of conveyance to the purchaser under the decree. Sir Vesey died in 1794, leaving the Appellant, his

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eldest son, who, under the limitations of the settlement of 1767, became entitled to an estate-tail in the lands, subject to a jointure and portion.

At the time of his father's death the Appellant was a prisoner in France, and so remained until the year 1805.

In 1802 a notice was served upon the Respondents, who were the co-heiresses of Thomas Richards, the purchaser, and their then intended husbands, that it was the intention of the Appellant to impeach the purchase made under the decree.

The bill in the cause, which was the subject of appeal, was filed against the Respondents in 1805, praying that the deeds of conveyance to Richards might be declared fraudulent, and void, that possession of the lands might be restored to the Appellant; and that the Respondents should account for the rents, &c., the Appellant offering to pay the purchase-money, with interest.

The cause was heard in 1811 on pleadings and proofs, when the bill was dismissed. The appeal was against the decree dismissing the bill.

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xcluded, for the estate was thereby directed to be sold for payment of incumbrances prior to the registry of that deed. That Vesey Colclough was in distress is evident. The lands were under the dominion of a receiver; annuities had been granted, by which they were improperly burdened; and it was under these circumstances that the auction took place. Part of these transactions has been the subject of another suit*, in which the decree of the court below was reversed on grounds and under circumstances in some respects, but not altogether, similar to the present case. It appears that from the death of the father in 1794, the Appellant was prisoner in France till October 1805. A part of his estate was sold to a Mr. Richards, and the transaction is impeached on the ground of fraud; the purchaser having obtained the estate at an under-value was held a party to the fraud, whether personally, or by the medium of an agent, is immaterial. The estate was put up to sale subject to the annuities granted by Sir Vesey Colclough to Caesar Colclough, for the life of Sir Vesey. It is clear that such a sale was not warranted by the decree, which included only incumbrances prior to the settlement of 1767, rejecting those which were subsequent. It appears to me that the Appellant was injured by the sale subject to those annuities during the life of his father, which reduced the value of the estate to that extent, and which induced the party to buy the annuities at a sum greater than was advanced to Sir Vesey Colclough. To the

* *Colclough v. Bolger*, 28 June 1816, MS.; and see Dow's rep. vol. v. p. 54.

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extent of those sums at least the estate was injured in value.

It is argued that persons purchasing under the authority of a decree ought to be safe; but it is a settled maxim of equity, that persons purchasing under decrees of the court are bound to see that the sale is made according to the decree. In a case the name of which I do not at this moment recollect, it was laid down by Lord Hardwicke, that it was the business of a purchaser to see that the persons who had the right to convey were before the court. If he takes a title which a decree in an imperfect suit does not protect, he must abide the consequences*. On these principles the Appellant has a right to impeach the transaction. The decree protects parties only according to its terms. The provision of the decree was, that the estate was to be sold, subject to incumbrances prior to and not subsequent to the settlement of 1767. And as to these latter incumbrances, the decree directed that the estate should be free from them. On that account the judgment is erroneous, and the purchase is with notice, because the title is founded on the decree: the purchaser had, moreover, full notice of the settlement, because it is recited in the conveyance. Such a sale, therefore, cannot be protected by the decree. Another objection to the proceeding is, that the estate was sold subject to leases which had been granted under pretence of the power, but were in fact contrary to it. It is probable, from circumstances established in the

* See *Giffard v. Hart*, 1 Scho. & Lef. 386. *Hamilton v. Houghton*, ante, vol. ii. p. 1.

dence, that the leases were fraudulently granted by Sir Vesey Colclough; that the purchaser had notice of the undervalue there is strong circumstantial proof, sufficient to impeach the transaction on that ground. It is not, however, necessary to resort to the ground of fraud; and without resting my opinion at all on that circumstance, but confining my view solely to the fact that this sale was made subject to the annuities, I think the decree is wrong: that is a clear ground; the other might require further investigation. Instead of dismissing the bill, the Court below ought to have granted relief. The consequence, if the sale is to be impeached, will be that the estate must be held by the trustees only as a security for the money paid into Court upon the purchase, with interest. The purchasers must, under the circumstances, be answerable for the rents of the estate from the death of Sir V. Colclough, not at an earlier period, though Sir V. Colclough was bound to keep down the interest of incumbrances. The rents and profits must be set against the principal and interest, and the balance paid into Court. The estate must be re-conveyed to the Appellant under the settlement of 1767. As to the lease subsequently granted by Sir V. Colclough being without consideration, and charged to have been fraudulently done by the aid of the receiver, the estate must be relieved from that incumbrance. As to the other leases, if they can be impeached, he may, as tenant in tail, try that question in a Court of law. The decree must be reversed, with a direction that the Respondent is liable for the rents, but that the purchase-money is a lien upon

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the estate. The rent to be charged ought not to be higher than what is reserved upon the lease. On payment of the balance (if any) of the purchase-money above the rent, the Respondent must reconvey the estate to the Appellant, in tail, with remainders, according to the settlement.

The Lord Chancellor :—If this decree is to be reversed it may be expedient to delay the final settlement of the order, that the parties may have the opportunity of suggesting any correction of the minutes, or supplying any defects.

The reversal of the decree may be a hardship upon the present Respondent; but if justice requires such a measure, the consideration of hardship must be disregarded. The decree cannot be supported unless the doctrines of Equity in Ireland differ from those in England. Sales under decrees are entitled to protection when they are conformable to the decree, but not otherwise. It might be consonant to moral justice to set a value upon the annuities, and add that value to the purchase-money; but where parties have made a purchase

ought to affect the purchaser may be questionable, since the Court itself ought to have noticed that defect in their proceedings. But the decree reciting the settlement directs a sale of the estates subject to incumbrances of a particular period. The estates are in part sold subject to after incumbrances, in which the purchasers had an interest, and directly contrary to the decree. The loan of money—the purchase of the annuities—the leases at undervalue, and other circumstances appearing on probable evidence, furnish grounds of suspicion. But at all events it is clear that a decree not obeyed, but violated, cannot be a protection to a purchaser.

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Lord Redesdale :—The length of time which has occurred between the death of Sir Vesey Colclough and the filing of the bill is a reason why costs should not be given.

Die Merc. 14 Mar. 1821.

Ordered and adjudged, That the said decree complained of in the said appeal be and the same is hereby reversed; and it is declared, That the sale of the lands of Curragh-duffe, Cloneburne, and Ballycreene otherwise Ballyvovocreene, in the pleadings mentioned, ought to be deemed fraudulent, and void as against the Appellant, and the several other persons claiming after him under the deeds of settlement of the 12th and 13th of June 1767, and ought to be set aside, so far as the same affected the interests of the Appellant, and the several persons claiming after him under such settlement: And it is further declared, That the deeds of conveyance of

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the 7th and 8th of March 1782 of the said lands of Curraghduffe, Cloneburne, and Ballycreene otherwise Ballyvocreene, ought to stand as securities only from the death of Sir Vesey Colclough for the sums of money actually paid by the said Thomas Richards, deceased, for the purchase of the said lands, according to the orders of the said Court of Chancery, together with interest for such sums of money from the death of Sir Vesey Colclough: And it is further ordered, That it be referred to one of the Masters of the Court of Chancery to take an account of the sums of money so paid by the said Thomas Richards, in pursuance of the orders of the said Court, and to compute interest thereon from the death of the said Sir Vesey Colclough; and also to take an account of the rents and profits of the said lands, which accrued after the death of the said Sir Vesey Colclough, received by the said Thomas Richards in his life-time, or by the Respondents, or any of them, after his death, or which, without their wilful default, might have been received; in taking which account the said Master is not to charge the estate of the said Thomas Richards, or the Respondents, with any greater rent for the lands subject to the leases in question granted by the said Sir Vesey Colclough, than the rents reserved by such leases, without prejudice to the question whether such leases were void against the Appellant, or those claiming under

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the interest accrued after the death of the said Sir Vesey Colclough, on the sums of money paid by the said Thomas Richards as aforesaid; and in case the same shall appear to have exceeded such interest, then that the said Master do apply the same in reduction of the principal sum: And it is further ordered, That the said Master do thereupon ascertain the balance; and upon payment of any sum remaining due for principal and interest upon balance of such account, or in case such principal and interest shall appear to have been satisfied by the application of such rents and profits as aforesaid, it is further ordered, That all proper parties do join in a re-conveyance of the said lands to the Appellant, according to his rights and interests in the said lands, under the said indentures of lease and release of the 12th and 13th of June 1767, and to the uses of such settlement now capable of taking effect, freed and discharged from any lease or incumbrance made by the said Thomas Richards, or any person or persons claiming under him; and in case, on taking such account as aforesaid, such principal and interest as aforesaid shall be, or appear to have been, overpaid by the application of such rents and profits, it is further ordered and adjudged, That the balance of such account shall be paid to the Appellant by the person or persons from whom such balance shall appear to be due: And it is further ordered and adjudged, That in case it shall appear that the Respondents cannot perfect the conveyance hereby directed to be made, free from incumbrances made by the said Thomas Richards, the Appellant, and the persons claiming after him, under the said settlement of the 12th and 13th June 1767, are entitled to satisfaction for the value of such incumbrances out of the assets of the said Thomas Richards; and that the said Court of Chancery do give all necessary directions for such purpose, but without prejudice to any question between the Appellant and those claiming after him under the said settlement of the, &c. and

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any person or persons not a party or parties to this suit:
And it is further ordered and adjudged, That, as between
the several parties to this suit, the Lords do not think fit
to give any costs of this suit to this time, but that all
subsequent costs be reserved for the consideration of the
said Court of Chancery, who shall make such order
touching the same as shall be just: and it is further
ordered, That the said Court of Chancery do give all
necessary directions for carrying this judgment into
execution.

SCOTLAND.

(COURT OF SESSION.)

LINWOODS

v.

HATHORN.

Mrs. JANE LINWOOD, Widow of
JOHN LINWOOD, late Farmer at
Freugh, and her Six Children,
ELIZABETH, JANE, HANNAH,
JOHN, THOMAS and GEORGE
LINWOOD, lawful Children of the
said JOHN LINWOOD,—*Paupers* } *Appellants*;

VANS HATHORN, Esq. of *Garth-*
land, Writer to the Signet, and } *Respondent*.
others - - - - - }

AN appeal, in which the essential parties are not served with the peremptory order to answer, and do not appear at the hearing, cannot proceed as against one of the Respondents.

Whether according to the practice of the House the hearing of the cause may be adjourned for the purpose of serving the absent parties, on payment of the ordinary costs.—*Quære*.

Agents and servants acting under general orders, but without the special direction of their master, having cut a tree on the side of a public road, which in falling killed a passenger, the widow and children of the person killed brought an action for damages against the master and the servants, in which action there was a judgment for the defendants. On appeal against this judgment, the agents and servants, as well as the master, were named as parties in the appeal, but were not served with the peremptory order to answer the appeal, nor brought before the House as parties at the hearing. The proceeding was held defective on this ground, as it would deprive the master of the remedy over or relief against the agents and servants, in case of a reversal of the judgment as against the master alone.

Semb. that under the circumstances of the case, if there had been no such defect of parties, damages ought not to have been given.

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THIS action was instituted in the Court of Session in Scotland, by the Appellants, in order to obtain an assythment or reparation for the loss which she and her children have sustained by the death of John Linwood, which was occasioned by the fall of a tree cut down upon the estate of Garthland, belonging to the Respondent, Mr. Vans Hathorn.

The tree was about eighteen inches diameter, and situated on a part of the property of Garthland, only a few feet removed from the public highway leading from the Mull of Galloway to the market-town of Stranraer. It was cut on the 27th November 1812, which happened to be a market-day at Stranraer. Mr. Linwood was riding along the road about mid-day on his way to the market, in company with three neighbouring farmers. No person was placed upon the road, or elsewhere, to give notice of danger, and no rope or other instrument employed to direct the fall of the tree; M'Kie and Graham were in the act of cutting it, and a strong wind was blowing from the east, on which side of the

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alleged, were all concerned in the transaction as the agents and servants of Mr. Hathorn.

The summons concluded, that these several persons "ought and should be decerned and ordained "to make payment, conjunctly and severally, to "the pursuers, of the sum of 2,000*l.* sterling as "a reparation to them of the great loss and damage "which they have sustained, and will sustain, by "the said John Linwood being deprived of his life "in manner aforesaid," besides expenses of process, and of extracting the decree.

Parties having been heard, and the Appellants having put in a condescendence by appointment, which was followed with answers, Lord Craigie, (Ordinary) allowed them a proof of their allegations. Accordingly a proof was led as to the facts founded on in support of the action.

The proof given on the part of the pursuers related, 1. To the situation, and the fact of cutting the tree; the improvident manner in which it was done, and the accident consequent upon it. 2. That the other parties acted under the orders of Mr. Vans Hathorn. On this point the proof did not go to any particular order as to the tree in question, but only as to general agency and management. 3. As to the situation, character and circumstances of Mr. Linwood, as a foundation to estimate the damages sustained. This part of the proof consisted chiefly of his skill as a farmer; his age; the duration of an unexpired lease, and his average farming profits.

Distinct from the pecuniary damage, the Appellants claimed consideration of a *solatium* due to the family for the loss of a husband and parent.

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1816.

The proof having been concluded, and the term for proving circumduced, the Lord Ordinary appointed the parties to prepare memorials upon the whole cause, and thereafter he pronounced the following interlocutor: "Having considered the
" memorial for the pursuers, also the memorial
" for the defender, Mr. Vans Hathorn, separate
" memorial for William Reid, another of the de-
" fenders (no memorial having been given in for
" Peter M'Kie and Matthew Graham, also de-
" fenders, nor for John Hathorn, who is now dead),
" with the proofs brought by the parties, writings
" produced, and former proceedings, appoints the
" parties to prepare, print, and box informations,
" betwixt and the first sederunt day in February
" next, and makes avizandum with the cause to the
" Lords of the Second Division of the Court; and
" at the same time appoints the proofs and writings
" founded on by the parties, to be printed and
" annexed to the information for the pursuers, the
" expense of printing the proofs and writings
" founded on, in the mean while, to be defrayed
" equally by the parties."

of the Court in a reclaiming petition, which was appointed to be answered, but “ The Lords having “ advised this petition, with the answers thereto, for “ the defenders, adhered to the interlocutor re- “ claimed against, and refused the desire of the “ petitioners.”

The Appellants, conceiving themselves to be aggrieved, appealed against the above-recited interlocutors.

For the Appellants, the following authorities were cited, on the general liability for direct or consequential damage arising from negligence:—Inst. lib. 4, tit. 3, s. 5. Bankton, B. 1, tit. 10, s. 41. Stair’s Inst. 1. 9. 7. Balfour’s Pract. 516. Fountainhall’s Decis. Index. Ersk. b. 4. t. 4. s. 105. That the civil remedy is not excluded by a decision upon a criminal charge for the same act.—The Creditors of *Buchanan v. Buntein*, Kilk. p. 495; *Ker v. Agent for the Sea Fire Office*. Fac. Coll. 17 Dec. 1793. That the owner of property is liable for the act of his agents and managers, Dig. lib. 9, tit. 3, l. 1; Blac. b. 1, c. 14, *ad finem*; Scotch Stat. 1669, c. 16; *Innes v. Magistrates of Edinburgh*, Fac. Coll. 6 Feb. 1798; *Black v. Caddell*, 9 Feb. 1804; *Drummond v. M^cGregor*, 26 Feb. 1813; *Keith v. Keir*, 10 June 1812; *Macmanus v. Crickett*, 1 East; *Smith v. Milne*, 8 March, 1810, Elch. Dec. 218, and in D. P. *

For the Respondents were cited, on the general question of responsibility, the exception to the rule

* *Laugher v. Pointer*, K. B. Trin. Term, 1826; a case not reported.

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HATHORN.

stated from the Digest, for the Appellants, viz. the *casus fortuitus*, as a sudden gust of wind, which was stated to be the cause of the accident in this case.—Dig. lib. 9, tit. 2, l. 30, s. 3. That assythment is only due upon the crime, and when that is established in a competent court, and cannot therefore be due after an acquittal.—Hume on Crime: vol. 1, p. 448. That masters are not liable for the acts of servants where they exceed the authority given.—Bankton, b. 1, t. 2, s. 30. Stair, b. 1, tit. 9, s. 5. Kaime's Principles of Equity, b. 1, p. 1, c. 1, s. 2, p. 63. *Macmanus v. Crickett, qua supra*. Dict. of Holt, C. J. in *Middleton v. Fowler*, Salk. 282. That assythment is a civil reparation in damages to the party for an act which, as to the public, is a crime, and is due from the criminal only.—*Lady Leithhall v. L. Fife*, Kaime's Sel. Decis. No. 25, Act. 1593, c. 174.

For the Appellants, *Mr. Wetherell, Mr. Oliphant*.

For the Respondents, *The Attorney-General Mr. C. Warren*.

All the parties in the suit below were named in the petition of appeal; but none of them had been served with an effectual order to answer the appeal, and on the hearing of the appeal Vans Hathorn only appeared. There was, therefore, no effective appeal against the other Respondents: Graham, the party immediately concerned in the act, was one of them. In this state of things it was urged, on the

behalf of the Appellants, that the condition of the summons being joint and several, relief might be had against any one or more.

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v.
HATHORN.

[During the argument, the Lord Chancellor made the following observations.]

The case must be considered as heard *ex parte* against all the parties but Vans Hathorn. With respect to the other parties, the peremptory order has not been served or applied for; they are not before the House, and the Appellants are not entitled to be heard as against them. The summons says that Graham was acting for the behoof or under the directions of Vans Hathorn, or John Hathorn, or W. Reid, or P. M'Kie: of such an allegation the sufficiency might be questioned. Proof that Vans Hathorn gave authority to any of them makes a different case. Where a judgment is given against several defendants, the plaintiff may take execution against one, and for the one who pays the damages the judgment itself and the fact of payment is evidence against the others for the purposes of contribution; but where there is a judgment of acquittal, the difficulty is great. The Master, in such a case, should never proceed against a servant who has been absolved by verdict. The conclusion of the summons is joint and several. But suppose an action against a coachmaster and a coachman, and an acquittal by verdict, could the master afterwards proceed against the servant? There is another way of viewing the case: if Vans Hathorn is liable, Graham also may be liable to him, and he might recover over against

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Graham; if, therefore, the appeal is given up against Graham, how can it proceed against V. Hathorn?

A question then arose, Whether the Appella paying the costs of the hearing should have libe to bring all the parties before the House? The Respondent's counsel, the question being put them by the Lord Chancellor, were not willing assent to this proposal, and the cause having b fully argued, stood over for consideration.

19 March
1821.

The Lord Chancellor :—In the course of hear this cause a question presented itself, Whether was possible that we could proceed to determin without bringing before the Court third pers who were not effective parties to the appeal at time when the cause was heard at the Bar? It at first thought by the House that the cause mi stand over, with liberty for the solicitor to apply leave to bring those parties before the House; t suggestion being made without prejudice to question, Whether, according to the course of pr tice of the House, such a petition could now available? Upon further consideration, however seemed expedient to go on to the extent to wh the argument could go at the Bar, as it might t out that the opinion of the House might be, tha those parties had been here the judgment could be reversed. Having attended to all the circu stances of the case, with all the feeling which longs to it, and the consequences to the Appella of the unfortunate accident out of which the ca

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arises, it does not appear to me that there is sufficient reason to advise the House to reverse the judgment ; and I think we may venture to proceed in the present state of the cause, in respect of parties. It would probably have made no difference, as to the result, if the other parties had been here ; because, in the circumstances of the case, it appears to me that the same judgment would have followed. The ordinary question being put, that the judgment should be reversed, I must humbly express my opinion that it ought to be affirmed.

Judgment affirmed.

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and others
v.
LILLIE
and others.

SCOTLAND.

COURT OF SESSION.

Messrs. DENNISTOUN, BUCHANAN
and Company, Merchants in } *Appellants.*
Glasgow - - - - - }

DAVID LILLIE and others, Under- } *Respondents.*
writers in Glasgow - - - - }

Agents of the owners of a ship, by a letter, saying, "The Brilliant will sail from Nassau for Clyde on the 1st of May, a running ship," instruct their correspondents to effect an insurance on the ship, which is done accordingly by them, showing this letter to the underwriters. There being a favourable opportunity of convoy, the ship sailed on the 23d of April. On the 11th of May she was captured. Held, in the court below, and on appeal, that the expression of the letter was positive, and not the statement of an expectation; and that the exhibition of the letter being a representation material to the risk covered by the policy, which was not true in fact or in the event, vitiated the policy.

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letter of the 19th March the Appellants are informed thus: "At a prize sale of a South Sea whaler and her cargo of oil, that took place here yesterday, we purchased on your account about 40,000 gallons of spermaceti oil, at 3s. 9½d. sterling per gallon; 14,000 gallons of which we intend to ship upon that remarkable fast-sailing schooner Brilliant, of 157 tons burthen, mounting six nine-pounders, to sail, *with or without* *convoy, about the first of May*; and on the value of which shipment you will please to make insurance. Messrs. Seton and Elliot will ship on board the Jessie 60,000 lbs. St. Domingo coffee, which they wish you to have insurance done for at 50s. per 100 lbs., and 17,000 lbs. Cuba coffee, at 60s. per 100 lbs. *They* also wish you to have insurance effected on the Brilliant from hence to Greenock, valuing her at 1,400*l.* sterling; to all of which we beg your attention." The letter of the 24th says, that the Brilliant would be cleared out as bound to Greenock and a port on the Continent. And in the letter of 2d April Messrs. Duff and Company state, towards the conclusion of the letter, which relates to a variety of other matters, "The Brilliant *will sail on the 1st of May*, a running vessel, in which the writer of this will take his passage."

Upon these advices an insurance was effected, *on ship and goods*, on the 18th of June, being the day after receiving the letters above quoted, although the contract or policy bears date on the 21st of June, three days later. At the time of entering into the contract the letters of advice were shown to the Respondents, who were some of the under-

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writers at Glasgow, with whom the insurance was effected.

The terms of the policy were, "From Nassau to Clyde, with leave to call at all ports and places whatsoever, *for convoy, or for any other purpose whatever, without* being deemed a deviation; and with or without letters of marque, leave to chase, capture, man and convoy, or send into port or ports, any vessel or vessels."

The insurance was done at the rate of six guineas *per cent.*, to return three pounds *per cent.* "for convoy for the voyage, or two pounds *per cent.* for *partial convoy and arrival.*"

About the 20th of April His Majesty's ship *Martin* came into the harbour of Nassau, and being bound for Halifax, the commander offered to take the *Brilliant* under his protection. This being considered a great advantage, as the risk of capture between Nassau and Halifax was imminent, extraordinary exertions were used to complete the loading of the *Brilliant*, and she sailed under convoy of the *Martin* on the 23d of April, being about eight days earlier than the date of sailing proposed

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and others
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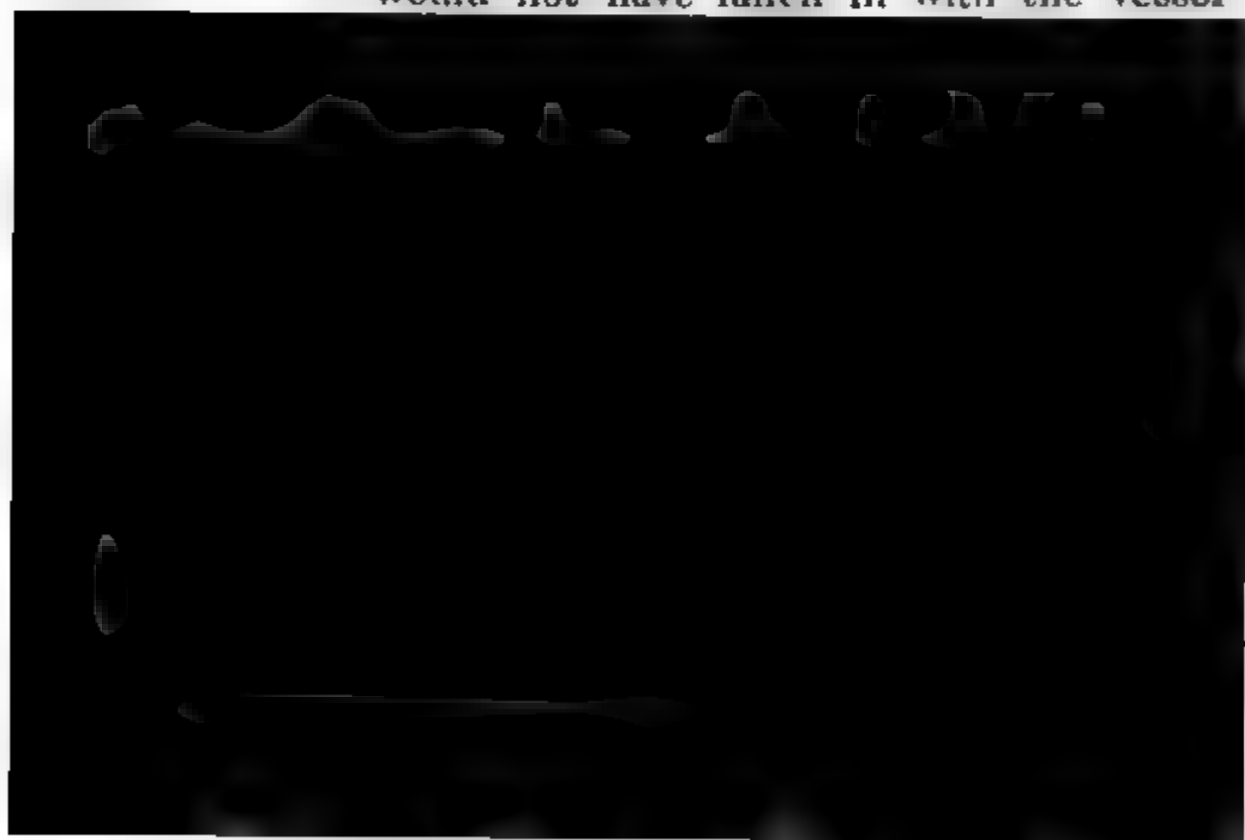
"The Judge Admiral, having advised the libel,
"defences, answers, replies, and writings produced,
"finds, that by a letter, dated the 19th of March
"1814, from William Duff and Company, the cor-
"respondents of the pursuers, of New Providence,
"to them, they mentioned the ship Brilliant, a re-
"markable fast-sailing schooner, was to sail, with
"or without convoy, about the 1st of May; and
"that by an after letter dated the 2d of April last,
"1814, the incorrectness of the word '*about*', as
"applicable to the 1st of May, was explained by
"the same correspondents informing the pursuers
"that the Brilliant was to sail for New Providence
"on the 1st of May, a running vessel, 'and in
"which the writer of this (William Duff) will take
"his passage :'. Finds it admitted, that these letters
"were communicated to the defenders, whereby
"they saw that the vessel was positively intended
"to remain in New Providence, and not to sail
"therefrom till the 1st of May last, and under this
"impression subscribed the policy in question :
"Finds, that the Brilliant sailed on the 23d of
"April from New Providence, and, for any thing
"known, may have been captured before the 1st
"day of May, when she was held forth to the de-
"fenders as remaining in the harbour : Finds,
"therefore, that although the representation made
"by the pursuers was absolutely innocent on their
"part, the fact stated by them to the defenders was
"not verified, and a material change was thereby
"made in the risk undertaken by the latter ; and
"therefore assoilzies the defenders, and finds them
"entitled to expenses."

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v.
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and others.

The Appellants brought the foregoing interlocutor under review of the Judge Admiral, by petition and the interlocutor thereon was, "The Judge Admiral having advised this petition, and answered dated 23d February last, with the writings produced, remains of the same opinion, that the petitioners, which the underwriters undertook, being confessedly that on a vessel to sail on the 1st of May was perfectly different from one on a vessel which sailed on the 23d April, inasmuch as the defendants undertook a risk on a vessel understood to be in the harbour, and safe on the 1st of May, whereas in fact she had been eight days at sea, Hence this petition, and adheres to the interlocutor explained of."

"*Note.*—The petitioners do not seem to dispute, that if the vessel had been taken before the 1st of May they would have had no argument. They however state that the vessel was not captured till 11th May. This, in real reason, makes no difference, since it is a thousand times more to one that if she had not sailed till 1st May she would not have fallen in with the vessel."



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The Appellants pursued an action of reduction before the Lords of Council and Session of the foregoing interlocutors pronounced by the Judge Admiral. This action was discussed before Lord Family, Ordinary, who pronounced an interlocutor, spelling the reasons of reduction, &c.

The Appellants submitted the question to review in a representation, to which answers were given in; but the Lord Ordinary adhered to the interlocutor.

The Appellants then brought these interlocutors under review of the Second Division of the Court of Session by a petition. The Lords adhered to the interlocutors complained of, &c.

The appeal was against the foregoing interlocutors.

On the part of the Appellants distinctions were taken between a warranty and a representation*, and it was contended that the letters exhibited did not amount to a warranty, or any thing more than a representation, which was not material; and that the statement of a future event, as an intended day of sailing, can be no more than an expectation.—*Bowden v. Vaughant*†; *Hubbard v. Glover*‡; *Barber v. Fletcher*§; *Bixe v. Fletcher*||. It was

* *Parson v. Watson*, Cowper, 790; Park on Insur. c. 10, 203, 205, c. 18, pp. 321, 322; Marsh on Insur. c. 9, s. 2, p. 342.

† 10 East, 415.

‡ 3 Camp. N. P. C. 313.

§ Doug. 305. In this case the word expected was used.

|| Doug. 271. See also Park, p.

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and others.

further argued, that the representation not being made *malâ fide*, the policy was not vitiated by such a misrepresentation.

For the Respondents it was contended, 1. That the day of sailing was a fact material to the risk, and being within the control of the Appellants, a statement of intention was equivalent to a statement of fact. 2. That the vessel having sailed on the 2^d of April, was, at the time when the insurance was effected, what is termed "a missing ship." — *Ridcliffe v. Shoolbred** ; *Tillis v. Brutton*†.

For the Appellants, *The Attorney General*
Mr. Abercrombie.

For the Respondents, *Mr. Wetherell, &*
Denman.

[In the course, and at the conclusion of the argument, the Lord Chancellor made the following observations.]

The second letter, in which it is expressly stated that the vessel will sail on the 1st of May, was shown to the underwriters, and is it not the same thing whether the party means to misrepresent or whether the thing actually communicated is misrepresentation? The authorities turn upon the difference between expectation and representation. In the case of *Barber v. Fletcher* the representation is, that the ship is *expected* to sail. If the accuracy of a representation as to time is to be given up, that doctrine must apply equally to the question

* Park, 180; Marshall, 1, 468. † Park, 182; Marshall, 46.

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and others
v.LILLIE
and others.

of place. The letter of the 2d of April speaks in terms of uncertainty as to the sailing of the Dart and the Jessie, but as to the Brilliant the statement is positive. Do the Appellants carry their arguments so far as to assert, that in cases which go beyond expectation, where there is a misrepresentation of a material fact, without a warranty or *malá fides*, the policy, according to the authorities, is not vacated? In the case of such a misrepresentation, *malá fides* is not necessary to render the contract inoperative. The principle of the judgment is the same in all the cases, although we cannot agree in all the decisions. The principle, and the application of the principle, are different things. To maintain the argument for the Appellant it is necessary to contend, that if the vessel had been captured on the 24th of April the underwriters would have been liable.

The *Lord Chancellor* :—This case resolves itself into two questions :—first, whether the representation was made, of which there is no doubt ; and secondly, whether it is a representation of an expectation, or a statement as of a past fact, which is material to the risk.

19 March
1821.

I have formed an opinion upon the subject, but wish to give it further consideration ; and this is the more necessary, as this branch of law is not well understood in Scotland. The case is to be determined upon a consideration of the facts, as a jury would decide under the direction of a judge as to the law applicable to those facts. The question for a jury would be, Was there in this case a misrepre-

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ENNISTOWN
and othersv.
KILLICK
and others.

resentation of a material fact affecting the risk covered by the policy*.

The *Lord Chancellor* :—In the absence of the noble Lord†, who was present at the hearing of the appeal, and by his desire, I suggest, that upon inspection of the policy of insurance (which is not sufficiently stated in the printed cases), it appears to be a policy upon the ship as well as goods. It is not therefore like the case of *Bowden v. Vaughan*, which was cited on the argument. In that case the policy was effected by the owner of goods, and on goods only. If there should be any desire to make further observations on the matter of the policy, they may be suggested at the meeting of the House on Wednesday.

5 April
1821.

The *Lord Chancellor* [after stating the question on the appeal] :—There is a difference between the representation of an expectation and the representation of a fact. The former is immaterial; but the latter avoids the policy if the fact misrepresented be material to the risk. After the most attentive

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ENGLAND.

NORBURY

v.

MEADE
and others.

(ON APPEAL FROM THE COURT OF EXCHEQUER.)

CONINGSBY NORBURY, Esq. - - *Appellant*;

The Honourable and Reverend	} <i>Respondents.</i>
PEARCE MEADE, and ELIZA-	
BETH his Wife, and SAMUEL	
ISTED, Esquire - - - - -	

A Plaintiff in equity must state his title in his bill, and, unless it is admitted by the Defendant, must prove it. In suits for tithes, the jurisdiction of a Court of Equity is limited to discovery and account. The title to tithes, as of other real property, is a question of a legal right upon which a Court of Equity has no jurisdiction; and if the title is disputed and doubtful, the Court has no right to make a decree.

A person suing as lay impropriator, for the tithes of a parish in which there has been within living memory a parish church and a burial ground, in order to establish his title, must show that there has been an appropriation, and when it was made; because if it was not prior to the 15th Ric. II. c. 6. it is further necessary, according to that statute, that an endowment of a vicarage should be shown, and if the Plaintiff does not allege and prove either that the appropriation was before the 15th Ric. II. or that a vicar has been endowed, *primâ facie* the appropriation is invalid.

Lands which had belonged to one of the lesser monasteries were not exempted as such from the payment of tithes in the hands of the grantees of the Crown, under the stat. 27 H. VIII. c. 20. At common law it has been held, that if such lands were otherwise discharged of tithes, the discharge being terminated by the dissolution of the monastery, the right of the ecclesiastical rector revived: but as between two monasteries, the one holding an impropriate rectory, and the other lands within the rectory, whether the same doctrine is applicable—*Quare*. *Semb.* that the case is not similar to a claim of exemption, as derived from a religious order, nor from unity of possession, but both bodies being capable of making an alienation, the monastery

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 v.
 MEADE
 and others.

having the impropriate rectory might convey the tithes to the other body holding the lands. It is the case of a right of exemption by conveyance, and ~~small~~ that it is a title which admits of proof by presumption. Upon a lease of tithes, by a lay impropriator, if the title of particular lands are excepted, it might admit of the construction that the lessor is entitled to that which he excepts. But if a former owner of the tithes upon a lease has made a parol declaration that he is not entitled to the tithes of those lands, that declaration is in itself important evidence, and gives a construction to the exception in the lease.

THE original Bill filed in this cause in Easter Term 1810 stated that the then Complainant, the Bishop of Dromore, in Ireland, was seised of the impropriate Rectory and Parsonage of the parish of St. Nicholas, in Droitwich (Worcestershire), and thereby entitled to the great and small tithes arising within the parish. That from the time of Plaintiff's seisin the Defendant held and occupied a certain farm in the parish, for which he had paid tithe by an annual composition till Michaelmas 1807, but that since that time he had refused to pay the Plaintiff such composition for the small tithes; and that besides the said lands, the Defendant occupied

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and others.

been paid was in satisfaction to Plaintiff, or his agents, for the great tithes only, and denied that he was entitled to small tithes; and he alleged, that in case any small tithes were payable, the Rector would be bound to contribute to the repair of the church, and to provide some ecclesiastical person to perform the duties within the parish, to whom such small tithes would have been payable if due at all; and that as no such person had been provided within memory, there must, therefore, at some former period have been an agreement between the then appropriate Rector and the parishioners, that in consideration of his foregoing the small tithes in the parish he should be relieved from the duty of serving and repairing the church; in proof of which, (he answer alleged) there had been no service performed in the church in the memory of any person living, except in two instances, within the last thirty years, of two persons having been buried in the churchyard; that the church itself was dilapidated; and that the tower, with a bell therein, and the outside walls of the old church, were standing within a few years; but that the walls and bell had lately been pulled down by the orders of the Plaintiff for the purpose of disposing of them for his benefit; and that the parsonage-house had, till about twenty years previously, been standing, and was inhabited, at that one of the late lessees of the tithes had once pulled it down, and disposed of the materials: and that in further evidence of such agreement there had never been any small tithes in kind, or any composition in lieu thereof, paid in the memory of any person living, except that two of the late lessees had demanded and received from some cottagers or

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small householders a trifling composition in lieu of vegetables growing in their gardens ; and submitted, that the Plaintiff was not, under the circumstances, entitled to any small tithes, or that if he were, it was his duty to procure the parish church to be served, and contribute to its repairs, and rebuild the parsonage house.

The Appellant also in his answer admitted his occupation, and having had titheable articles upon the lands called the Lower Friars, without paying or making any satisfaction for the tithes ; and stated that he occupied those lands by virtue of a lease granted by the Marquis of Exeter, then deceased, and his wife, formerly Emma Vernon, the then owners of the land ; and that he believed the lands called the Lower Friars were part of the possessions of the dissolved Priory of the Friars Augustines, in Droitwich, commonly called the Augustine Friars, and were granted by letters patent, bearing date the 24th of February, in the 34th year of the reign of King Henry VIII. to John Pye and Robert Were alias Browne, in fee ; and the same were afterwards, by bargain and sale, bearing date the 2d of February,

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under whom the Appellant was in possession, and through which ancestor, the Marquis of Exeter, and his then wife, derived title. And further stating, that by such means, *or otherwise*, the tithes of the said lands had been duly granted, and legally passed to, and became vested in, the owners of the land, and had descended upon, and became vested in, Emma Vernon, and by means thereof, *or otherwise*, the lands *were exempt* from the payment of tithes in kind, or any satisfaction in lieu thereof, and that no tithes in kind, nor any satisfaction in lieu thereof, had ever, within the memory of any person living, or since the lands were, as before stated, conveyed to Sir John Packington, been paid for the lands in question. But on the contrary, such lands had always been deemed, and reputed to be, tithe-free, and no demand had ever been made upon any owner or occupier of such lands for any tithes in kind, or any satisfaction in lieu thereof, until the exhibiting of the Plaintiff's original Bill.

The cause being at issue, witnesses were examined on the part of the Plaintiff in the suit, but not on the part of the Appellant. The parol evidence on the part of the Plaintiff, who deduced his title to the impropriate Rectory by descent from Sir John Packington, tended principally to show that both the great and small tithes had been always considered as included in the composition which had been paid to the Plaintiff, and as due to him in quality of lay impropriator, and not as vicar, or to any other ecclesiastical person, there having been no such person within memory; and that no claim to any of the small tithes had ever been set up by any other person; and several old leases of the great and small tithes by Plaintiff's predecessors were produced.

The cause came on to be heard and was argued

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and others.

upon the 29th January, 3d and 6th of May 1816. On the part of the Plaintiff, conveyances, leases, & will, and other assurances, commencing as far back as the year 1670, were read to show that the impropriate rectory, and all tithes within the parish of St. Nicholas, in Droitwich, had been conveyed, demised, and disposed of as lay property. In one of the leases, dated the 10th of August 1801, from the Plaintiff in the original Bill to one Richard Smith, the demise is of all tithes in the said parish, except the tithes of the Lower Friars; and the depositions of several witnesses were read to show that the Plaintiff in the original Bill, and those under whom he derived title, had been in perception of the tithes in the said parish; but none of them proved that any tithes had ever been paid, or satisfaction in lieu of tithes made for the *Lower Friars*; on the contrary, Richard Smith deposed on the part of the Plaintiff, that William Clieveland, a former proprietor of the tithes as lay-rector, under whom the Plaintiff in the original Bill derived title, was in possession of the tithes of the said parish, except of certain

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present owners, under whom the Appellant held them as lessee. On the part of the Appellant, also were produced in evidence, three leases, dated the 10th January 1783, 21st March 1786, and 10th March 1788, from William Clieveland to George Bedford, of all the tithes in the parish. The deposition of Richard Smith, read for the Plaintiff, was likewise read for the Appellant, as was also the deposition of George Bedford, (the lessee in the leases before mentioned from William Clieveland,) a witness examined for the Plaintiff, in which he stated, that in the year 1780 William Clieveland, his lessor, set the tithes in the parish of St. Nicholas, which were then in the possession of witness, and which he continued to enjoy till the death of William Clieveland, except the tithes of lands in the said parish called the Upper and Lower Friars, and a meadow called the Vines, comprising, amongst others, the lands in question, which William Clieveland informed the witness were tithe-free.

The cause stood adjourned from the 6th to the 20th day of May 1816, on which latter day the Court* below delivered their opinions, *seriatim*, and ordered and decreed, that an account should be taken of the tithes demanded by the original Bill against the Appellant, with costs.

The Appellants, at the hearing, proposed to read a conveyance from Sir John to Thomas Packington, and the will of Thomas, devising the rectory to Mary Packington, through whom the Respondents claimed†; but the Court intimated that such evidence

* Dissentiente, Wood, B. See 2 Price, p. 338.

† It appears that these documents were entered as read. See the addit. Appx.

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would be useless without showing an express grant of the tithes of the Lower Friars; and as to the other land occupied by the Appellant, it was admitted they had no defence; if the Court were of opinion that the plaintiff had proved his title, which appearing to be the opinion of the Court, the defence was confined to the claim of the tithes of the Lower Friars.

The Respondents became entitled, and were made parties to the suit by a supplemental bill, as the devisees and representatives of the Bishop of Dromore, who died pending the original suit.

The Appellant in the session 1817 presented a petition against this decree, in so far, as an account was thereby directed of the tithes of the Lower Friars, praying that so much of the decree might be altogether reversed, or that a trial at law might be directed upon the legal right before any account should be decreed.

7 August
and
14 February
1821.

For the Appellant, it was argued that tithes in the hands of laymen are now of a different nature from what they were at common law while they constituted the revenues of ecclesiastics; for by the several statutes respecting the dissolution of monas-

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other incidents belonging to temporal inheritances. Since grants of tithes are now capable of being made, and liable to be lost, the same evidence ought to be allowed from whence they are to be presumed, and the want of them supplied, as would suffice in regard to lands and other hereditaments; and the like bar, by adverse possession and length of time, by analogy, ought to be interposed against the remedy for recovery of tithes.

In favour of Holy Church, the policy of the law was that laymen should not prescribe in *non decimando*, thereby spoiling spiritual persons of their revenues. When tithes were converted into lay-fees the maxims referrible to presumed grants, descents, discontinuances, non-claims, &c. necessarily follow, which were nothing more than the wise arts and inventions of the law to protect and quiet the possession, and strengthen the right of purchasers. The fact of long and uninterrupted retention of the tithes in question creates a legal right, which ought to be tried at law; a Court of Equity has no right to decree upon depositions against it. The adverse claim is against long and quiet possession and enjoyment, and to overturn property in which the owners have thought themselves secure, now beyond all memory of writing, or man. A Court of Equity cannot set aside or decide against the consequences of this legal right; it would be determining a right against constant possession, and constant usage and enjoyment. There is nothing a Court of Equity can not presume in favour of possession. Possession is every thing; estates are bought by it, and held upon the faith of it; a claim against long possession is always repro-

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bated; and here a Court of Equity, on a question arising on a legal right, ought not, at least in the first instance, and without a previous trial at law, to have determined and made a decree.

The circumstances of this case amount to a long and uniform non-payment and retention of the tithes by the owners and occupiers of the land in question; and not merely a non-claim, but positive disclaimer on the part of one or more of the impropiators, particularly William Clieveland, under whom the Respondents derive title, making several leases of the tithes, with an exception of the tithes from the lands in question, accompanied at the same time by a declaration from the lessor to the tenants that such exception was inserted because the lands were tithe-free.

It is true the property in question is small, but the principle to be established by this decision confessedly great. Prescription has no place here; presumed grant is the basis upon which the Appellant rests his defence; arguments of inconvenience deserve attention; tithes of great value in this kingdom are enjoyed under titles similar. The con-

parishes, and possibly spoil the ancient possessors of their acknowledged rights.

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For the Respondents, the case was put upon the ground of the maxim, supported by a long series of uniform decisions, that there can be no prescription in *non decimando*.

An objection* being suggested for want of proof of the appropriation before the 15 Ric. II. or the endowment of a vicarage, an observation, said to have been made by Lord Chief Baron Thomson (and not noticed in the report of the case,) “that as there was “a place of worship there might have been a vicarage “endowed,” was cited for the Respondents, to which Lord Redesdale replied, that there could be no parish without a church, and that there might be a chapel also; that the original appropriation of tithes was to the incumbent of the church of the parish, and *prima facie* belonged to him; but that this had been modified, and certain portions of the tithes might be vested in other persons; but it was an exception to the general law.

Upon the objection as to the deficiency of proof of title* in the Plaintiffs, it was urged that the property was conveyed as a rectory in 1642, and devised as such in 1663; that the documents showing title in the Plaintiffs were produced and relied upon by the Defendants; that a grant from the Crown was the best but not the only mode of proof, and the fact being admitted by the Defendants, that there was no need of proof.

It was further urged on behalf of the Respondents

* See *post.* the observations of Lord Redesdale, pp. 224 and 233, *et seq.*

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that the defence raised by the answer, consisting of title and exemption, was double, uncertain, and inconsistent, which had been held not to be allowable; *Ward v. Shepherd* *. That the lands and the rectory being in the same person furnished no ground to presume a release of tithes; that in the cases † where the Courts of Equity had refused to interfere on behalf of a lay-impropriator against the occupier of lands, to enforce tithes, they did so on the ground of long adverse possession and colour of title, supported by documentary proof: that the tithes in question in those cases had been from time to time, for a long series of years, conveyed and dealt with as matter of property. In this case no such proof existed, and as the lands in question belonged to one of the lesser monasteries that furnished no ground to presume an exemption.

On behalf of the Appellants, in reply, upon the objection as to the double pleading of the answer, it was urged that such pleading was allowed in the case of *Jennings v. Lettice* ‡; that the words "or otherwise," which seemed indefinite, might refer to conveyances under the statute of Henry VIII.

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*Lord Redesdale**:—It may be important to consider how unity of possession may affect the right to tithes. Suppose I had a rectory impropriate, and lands within the rectory which I had leased exempt from tithes, and then conveyed the reversion of the lands as I held them, that would be exempt from tithes. The rectory and the lands having been both in the Crown it is important to inquire whether the rectory or the land were first conveyed. Suppose the grant, and the record of the rectory and of the lands, to have been lost, would not the actual state of things, the enjoyment, furnish a presumption of title?

The *Lord Chancellor*:—In *Scott v. Airey*† it was decided that a Court of Equity in such a case would not interfere. In one of the cases Baron Eyre said if these doctrines were to be maintained the Courts had gone presumption-mad.

The question is, whether in the face of enjoyment we can interfere; whether we must not leave it to law? The Court of Exchequer, in those cases in which they refused to act did not intend to determine whether there was or was not a title to the tithes, but merely that there was not sufficient ground to warrant a Court of Equity in disturbing the possession.

Lord Redesdale:—The real question in *Scott v. Airey* was, whether there was not evidence of

* The following observations were interlocutory, and occurred in the course of the argument.

† 3 Gwill. *quâ supra*.

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a portion of tithes within the rectory. A portion could not be in lay hands unless it had come through the Crown by grant.

The *Lord Chancellor* :—In the case of a spiritual rector it has been held that there can be no prescription in *non decimando*. If non-payment of tithes is a different thing, and sufficient to ground a presumption, a title may always be made out; for you may presume first a portion of tithes, and then the loss of a grant *.

Two preliminary questions may be raised in this case, the first, whether the title of the Plaintiff is sufficiently set out in the bill, and supported by proof in the cause? Secondly, whether the points of defence raised by the answer are sustainable?

Lord *Redesdale* :—According to ancient practice in suits by lay impropriators, the production of the original grant, and a regular deduction of the title by the necessary documents, was required. That practice was altered in consideration of the frequent loss of the instruments of title; but it is still necessary to produce the original grant, and to

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The Lord Chancellor :—A lay impropriator must claim under his deeds. If he shows uniform exclusive possession, that may raise a presumption in the absence of deeds ; but here, neither the title by deed, nor the perception of the tithes, is shown ; and yet it is required of the Defendants, if they claim by title, that they should give that strict proof which the Plaintiffs fail to give. The question is, whether they have evidence equivalent to the production of deeds? They claim contrary to the common law. They must show a legal commencement of their title. They must show an impropriation before the 15 Richard II. or the 4 Henry IV., or they must show the endowment of a vicarage. The first of those statutes enacts, that there shall be no impropriation without such an endowment. The second requires that a vicar should be canonically instituted. There is no such vicar in this parish ; and the title of the Plaintiff by deed or possession is not clearly made out ; the deduction of title in the Plaintiff may be material to the defence. The decision of this case has proceeded on the single ground, that a prescription in *non decimando* is illegal ; but if that is alleged as matter of title it may raise a different question.

At the conclusion of the argument, *The Lord Chancellor* made the following observations :—

This being the first case involving the particular point, which is of great consequence, and a noble and learned Lord*, who has given particular attention to the subject, being absent, the House ought not to

* Lord Redesdale, who had left the House before the conclusion of the argument.

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proceed to judgment at present. There is ~~also~~ another circumstance requiring great consideration, provided the case ought to be decided upon ~~the~~ evidence which has been adduced at the bar, attending to the special circumstances, under which it is represented this case has come before us. I am sure the House will feel the importance of considering, with great diligence and attention, what they will or will not do after there has been, as represented, a long course of uniform decision in the Courts below; for it will be impossible to give a judgment on the general ground without affecting many decisions which have been made in the Courts below, and probably disturbing considerable property which is at present held under those decisions. If this case, on the one hand, is to proceed on the special evidence to which I have alluded, it ought to be understood that it does proceed on that specialty which occurs in this case; or, on the other hand, if the judgment of the House is intended to reverse all the decisions to which I have alluded, it is fit that question should not be left in the same state of doubt in which it has been represented to exist. It seems necessary, therefore, that you should have some further time for consideration; I wish also to see a copy of the answer, for all the rules of pleading which used to be adopted when I practised in the Court of Exchequer seem to have been lost sight of. In making this observation I do not mean to reflect upon the memory of that respectable gentleman*, whom I well knew when living, and who drew the answer; but I take it from the answer itself, that he found he had a very difficult case to

* Mr. Hall.

deal with, and that he felt he must deal with it in the best way he could.

It appears to me that this is a case extremely simple, for the words stand thus * : “ That the Appellant, soon after filing the same original bill, put in his answer thereto, declaring his ignorance of the Plaintiff’s alleged title, but admitting the Appellant’s occupation, and having had titheable articles upon the lands in question, without paying any satisfaction for or in respect of the tithes ; and stating that he was in the occupation of the lands in question by virtue of a lease granted thereof by the late Marquis of Exeter, then deceased, and his wife, formerly Emma Vernon, the then owners of the land, and that he believed the lands,” (not the lands and the tithes, but “ the lands) called the Lower Friars, were part of the possessions of the dissolved priory of the Friars Augustines in Droitwich, commonly called the Augustine Friars, and were granted by letters patent, bearing date the 24th February, in the 34th year of the reign of King Henry VIII, to John Pye, and Robert Were *alias* Browne, in fee, and the same” (that is, the lands) “ were afterwards, by bargain and sale, bearing date the 2d of February, in the second year of the reign of King Edward VI, duly conveyed to Sir John Packington, knight, his heirs and assigns,” (and then, with respect to the title to the tithes, all he says is this,) “ who at that time, as he had been informed, was, or claimed to be, entitled to the tithes of the lands ;” under what sort of claim, or how

* In the Appellant’s printed case.

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entitled, this pleading does not in any manner point out. The words in which it is set forth merely state some unspecified claim to the tithes then it goes on to say, "that he believed that the said lands and the tithes thereof (in case the said Sir John Packington were entitled thereto)." Now if the declaration of Clieveland, that these estates were tithe-free, is a declaration of any importance I think we may say this qualifying parenthesis brings down a little the value of the assertion, "he believed that the said lands and the tithes thereof (in case Sir John Packington were entitled thereto) were afterwards duly conveyed and granted, by diverse mesne conveyances, to several persons, and at length were conveyed and granted to, and had been vested in, an ancestor of the said Emma Vernon, one of the lessors, under whom he was in possession, and through which ancestor the said late marquis and his then wife derived title thereto; and further stating, that by such means, or otherwise," (and here it occurs to me, which it did not at first, that these words "or otherwise" are put in with great caution and with great pro-

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‘ thereof, and that no tithes in kind, nor any
 ‘ satisfaction in lieu thereof, had ever within the
 ‘ memory of any person living, or since the said
 ‘ lands were, as before stated, conveyed to the said
 ‘ Sir John Packington, been paid for the lands in
 ‘ question, but on the contrary such lands had
 ‘ always been deemed and reputed to be tithe-free.”

This pleading, therefore, simply brings the title
 down to Sir John Packington. This lessee does not
 pretend to be the lessee of the tithes, but only the
 lessee of the lands, which shows the distinction be-
 tween enjoyment and possession of tithes as a
 separate inheritance, and leads to the understand-
 ing of that principle, whether good or bad, on
 which the courts have hitherto proceeded ; for if Sir
 John Packington let him the lands, he cannot say
 he let him the tithes ; if he pays a rent for the lands,
 he enjoys the lands for the payment of the rent ; and
 Sir John Packington has the use and enjoyment of
 the lands by the payment to him of the rent, but
 neither he nor the other is in the enjoyment of the
 tithes ; that principle being felt, they found it ne-
 cessary to go on and lay hold of another defence,
 and say the lands were exempt from the payment of
 tithes ; that they had always been deemed and re-
 puted to be tithe-free. I do not know in what way
 at the present day the Court of Exchequer call upon
 parties to plead ; but I think it would not be deemed
 sufficient simply to aver that the lands were exempt
 from the payment of tithes, and had always been
 deemed and reputed to be tithe-free ; or on the other
 hand, if the plea be good as to the exemption from
 the payment of the tithes, then the question will

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be, whether there is not a double plea under the title of freedom from the payment of tithes; if you could not make out the freedom from the payment of tithes simply by the party talking with the owner, the Court would never apply that as positive evidence to warrant the taking of tithes in pernaney: it appears to me that this raises very great difficulty in the case, if we are to get at the great point of the case without evidence. I address myself without prejudice, speaking according to my impression of the law, being bound so to state it under the sanction of the cases (a); and according to (unless I greatly misunderstand it) the doctrine which has been laid down by men of talents and knowledge, to which, whether taken collectively or singly, I cannot pretend. The principle they have gone upon is this, that there is a very considerable difference (the grounds of which you may have hereafter to explain) between a mere detainer of tithes, and where tithes have been detained under what is called a colourable title; and it will be found, when you come to discuss that matter, that it is not quite so clear that evidence may be fabricated at the back of the rector as not to shut it

reasons, and others which might be stated, I should feel more satisfied in having some time to review my present opinion, and to see whether my recollection is right as to the doctrines of law which I have now stated. It will afford me an opportunity to rectify and correct any errors I may have fallen into, by consulting with a noble and learned person not now present, who has paid great attention to this subject.

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The Lord Chancellor :—Upon looking to the pleadings and proofs of this cause, I mean to propose that one counsel on each side should be heard upon two points; the first is, *the title of the Plaintiff not being admitted by the answer, whether it is sufficiently proved by the evidence*; and the other is, supposing the title to be sufficiently proved, whether the pleading, on the part of the Defendants, is the proper pleading to bring forward the points on which the Defendant relies. I propose this course because it is highly expedient that when we are deciding a question of so much importance as the principal point in this cause, care should be taken that the proceeding of the House should not be represented hereafter as a proceeding not quite correct in point of pleading.

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It was thereupon ordered, on the motion of the Lord Chancellor, that one counsel on each side be heard upon the question whether the title of the Plaintiff is sufficiently set out and proved; and supposing it to be so, whether the points insisted upon by the Defendant at the hearing are properly pleaded.

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Mr. Martin and *Mr. Wetherell* accordingly argued these points before the House, and the case then stood over for judgment.

The *Lord Chancellor* :— In the case of *Norbury v. Meade*, if it should appear to those who are to advise the House, that it is necessary to make any alteration in the judgment, it cannot be proposed without addressing your Lordships at very considerable length upon the doctrines with reference to cases of that nature. It is, therefore, necessary to ask of your Lordships for some further time to consider the proposed judgment.

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Lord Redesdale :— The question in this case was considered as principally depending upon this, whether a grant of tithes, from a lay impropriator to the owner of certain lands in the parish of St. Nicholas in Droitwich, ought to be presumed or not; and the arguments principally went originally upon that ground. A doubt was then stated whether the Plaintiffs in the suit, who are the Respondents in this Appeal, had or had not sufficiently

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hat under the circumstances of the case those
nds ought, in some manner or other, to be pre-
umed to be discharged from the payment of tithes.
The defence was not very precise; but upon look-
ing into the case, the title set out by the Plaintiffs
was certainly greatly deficient, because the Plaintiffs
in that suit claimed as being entitled to an impro-
prietate rectory; but they did not show how they
were entitled; and they did not state, in their bill,
to produce in evidence before the Court, any thing
clearly to show that title.

The Plaintiff in this suit must recover by force
of his title; and supposing the defence to be ever
so defective, if the Plaintiff does not show a title
the Court has no right to make a decree in his
favour unless that title is clearly admitted by the
Defendant; but here the Defendant unquestion-
ably disputed the title. The consequence was,
therefore, that the Plaintiff was bound to prove his
title.

The claim was of all tithes, great and small,
within this parish; and it appears from the evi-
dence that there was a parish church, and a burial
ground appertaining to that church, and therefore
that there had been at some time a rector of that
church, in whom all the rights of that church were
vested. Undoubtedly there might have been an
appropriation of that church, but it was very mate-
rial to ascertain when that appropriation was made,
because if the appropriation was made subsequent
to the 15th of Rich. II. it could be no lawful appro-
priation without the endowment of a vicar; and if
there was no vicar endowed the appropriation was

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not good; therefore it was important to make out the title of the Plaintiffs in that suit, that they should have shown, or given some species of evidence to show, that it was an appropriation prior to the 15th of Rich. II., or to show that there was an endowed vicar. They have shown neither, and therefore, *prima facie*, the appropriation under which they claim is not a good appropriation, because if it was not prior to the 15th of Richard II., and therefore an appropriation capable of being made without the endowment of a vicar, the consequence was, that being subsequent to the 15th of Richard II. it was not a good appropriation, because the law has expressly forbidden such an appropriation without the endowment of a vicar.

By some means, however, this appropriation was in the hands of one of the monasteries which were dissolved in the reign of Henry VIII.; and then was also in the hands of another monastery a property of land, including the lands which are the subject of this Appeal. The claim set up by the Plaintiffs in this suit was to the whole of the tithes, great and small, of these lands. It is clear

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ferred the right both of the impropriation and the lands, if properly vested in the respective monasteries. They are both by grants of the Crown, as it was to be presumed, in one case shown, in the other case not; but they were to be presumed to be vested in the person who set up these different claims. If the Plaintiffs in the suit could not show a distinct title to demand all the tithes, great and small, the Defendants ought not to have been called upon for their defence. The Court, however, seems to have proceeded upon this ground: they assume the right of the impropriation, and then assuming that right, they seem to have conceived that the Defendant must make out his title to hold these lands exempt from the payment of tithes. He could not claim that exemption in right of the monastery from which he derived his title under the statute of Henry VIII., because it was one of the smaller monasteries, with respect to which the exemptions to which they had been entitled were not reserved by the statute. But even here, as I apprehend, the Court made a mistake, because all that has been decided upon that subject amounts only to this; if the monastery which claimed to hold discharged from the payment of tithes, claimed to hold so discharged against an ecclesiastical rector, there the common law said, that the discharge being put an end to, the right of the ecclesiastical rector remained. It may have been, but I cannot find that it has been, decided, that the same thing holds between two monasteries, one claiming an impropriation, and the other claiming land, because both those bodies were capable of making a complete

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alienation. The monastery which held the impropriation could make an alienation to another monastery of the tithes which were due from the lands of that monastery; and it was not an exemption claimed by a religious order, but a title derived from persons capable of making a title; exemption by the unity of possession is a totally different thing, but this is a case in which their right may be an exemption from the payment of tithes by actual conveyance from one monastery to the other. That such things exist, I know. The conveyance of tithes is capable at least of a species of proof. One monastery having lands, and another monastery having an impropriate rectory, they came to an agreement, the monastery who had the impropriation discharging the other monastery from the payment of tithes on those particular lands. I do not conceive that there was any thing illegal in that, and therefore that is a species of title that was capable of being shown even by presumption.

. But the Plaintiffs in the suit, according to what has been offered in the Court below, must found their claims upon presumption. They show no

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they show no possession of the tithes of those lands. On the contrary, it appears there was a constant denial of their title to the tithes of those particular lands, together with something very like disclaimer on the part of the person who claimed impropriation, of a right to the tithes of those particular lands.

The Court below seem to have proceeded upon general ground, which is applicable, unquestionably, to the case of an ecclesiastical rector, that prescription *in non decimando* is purely illegal; that there can be no such prescription. There might, it was admitted, be a right by grant, but that grant must be shown: There might be a right under a reservation by the statute of Henry I. dissolving the greater monasteries, but that circumstance does not apply to this case; and the Court proceeded to take it for granted that the plaintiffs in this case had the rectory, and having the rectory, that a prescription *in non decimando* was equally purely illegal against an impropriator as well against an ecclesiastical rector.

Now what is the ground of that doctrine in relation to tithes? Before the Reformation, if land lay within a parish, the incumbent, the rector of that parish, must be entitled to the tithes of that land, or to some compensation for those tithes, by a fine or composition real, which comes to the same thing, unless the lands for which the exemption was claimed were lands that were vested in a monastery claiming an exemption, under certain circumstances, from the payment of tithes. The ground of this is, that though the rector, under certain circum-

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stances, or the vicar, if there was an endowed vicar, might take a compensation; he could not alienate the tithes without compensation.

After the Reformation a number of rectories and lands vested in monasteries were vested in the Crown by the two Acts of Parliament of the 27th and 31st of Henry VIII., the latter reserving to the lands of a monastery discharged from tithes at the time of the Dissolution the same discharge in the hands of the Crown, or the grantee of the Crown, the former statute not containing that provision. But no title to discharge could be set up under the monastery through which the lands in question were taken, against a person clearly entitled to the rectory of that parish, neither before nor subsequent to the Dissolution, because if there had existed such a right prior to the Dissolution, as to the lesser monasteries not being reserved, that right could not prevail.

The lands and the rectory were united in the Crown by different titles; this appears clearly with respect to the land, and it must be to a certain degree presumed with respect to the rectory, because the persons who claim the rectory as a rectory impropriate cannot claim that but by a grant of the Crown; and though there is no evidence whatsoever with respect to the grant of the rectory, yet as they must claim under a grant of the Crown, they cannot pretend to say that their title may not be affected by that circumstance, because the land, when they were in the hands of the Crown, might be occupied by the lessee of the Crown, discharged of tithes by the unity of possession in the Crown;

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and if discharged of tithes by unity of possession in the Crown, and the Crown made a grant of those lands, having itself the rectory, and made the grant on such terms as would convey the lands to the grantee, precisely as the lessee of those lands held them, the consequence seems to me to be that the grant of the Crown would convey the tithes of those lands. The Crown was capable by its grant of discharging these lands from the payment of tithes, that is, by conveying a right to the tithes, and consequently of discharging the lands. I cannot see by a presumption of that kind is incapable of being maintained. It seems to me to be a title capable of legal beginning; and the ground upon which it is held, that there can be no presumption against an ecclesiastical rector or vicar of this description is, that there can be no legal beginning of such a title.

If the Respondent in this case had shown that the King demised the lands separately, and the rectory, including the tithes of the land in question, had also been demised separately, so that there was a separate grantee of the tithes at the time of the grant of the lands by the Crown, that would tend to rebut such a presumption; but there is not the slightest evidence of that description. The Respondents have not done what they ought to have done, and that the Court ought to have called upon them to do before they proceeded farther in the cause; they ought to have called upon them in the first instance to have shown the grant of the Crown under which they claim, for they could have no title except under grant of the Crown; and therefore, unless the defendant fully admitted the right of the Plaintiff,

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and so dispensed with the production of his title, ~~in~~ all cases of this description the person claiming ~~an~~ impropriate rectory must produce the grant of ~~the~~ Crown. I admit, that it is now held that it is ~~not~~ necessary for an impropriate rector, in such case, to deduce his title from one person to another, after a grant from the Crown has been shown. Why? because the Courts are aware that deeds of that description may be lost; and therefore, if the grant of the Crown is shown, and if a recent title, or possession according to that title, is shown, then the Court will admit a presumption that the title has been properly deduced.

But why is there to be a presumption on one side, and no presumption on the other? It seems to me extraordinary that a Court of Equity should hold that there may be a presumption in favour of a rectory impropriate, but that there can be no presumption against a rectory impropriate. What difference is there between the title of a lay rector impropriate to the tithes of land, and the title of the other person who holds the lands from which the tithes are claimed? They are both equally fees; both equally capable of alienation; and why there should be a presumption in favour of a lay rector, and no presumption in favour of the occupier of the lands, I must confess I cannot conceive. In both cases it must be founded upon the very probable supposition of the loss of instruments. I believe it will be found that the titles to half the estates in the kingdom would be held to be bad if there was no presumption of the loss of instruments. In the case of rectories impropriate very few persons would be

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le to to deduce their titles correctly from the
ant of the Crown ; they must deduce their titles
om circumstances arising in past times. In this
se it appears to me that there is such ground of
esumption ; and I cannot conceive how a Court

Equity should imagine that, upon the ground
on which a Court of Equity is to deal with such
ase, they could make the decree they have made.

It appeared from the evidence that both the rec-
y and the lands came to Sir John Packington,
I that Sir John Packington having the rectory
anted the lands. When he conveyed the lands,
ald he not convey them as he held them ? Is it
obable that he conveyed them subject to tithes,
lding them himself not subject to tithes, though
might, if he thought fit, have made a separate
mise of the tithes and of the land. That circum-
ance alone seems to afford ground of presumption,
ld a very strong ground of presumption, especially
mpled with this, that there is no evidence of the
ersons, who afterwards derived title from Sir John
ckington to the rectory inappropriate, having ever
eived or ever claimed tithes of these lands ; but
the contrary, that the person under whom Mrs.
eade now claims had in effect said that he was not
titled to the tithes of these lands ; that these lands
re discharged from tithes. That disclaimer on
e part of an ecclesiastical rector would not operate
ch, but a disclaimer on the part of a lay rector
ght to operate in the same way as if a man seised
lands at this day had a right of way or any ease-
ent over the lands of another ; I cannot distinguish
etween them. In the case of a right of way over

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the lands of other persons, being an easement belonging to lands, if the owner chooses to say I have no right of way over those lands, that is disclaiming that right of way; and though the previous title might be shown, a subsequent release of the right might be presumed. What is the difference between that case and this? I conceive that a lay rector may release the tithes, and the consequence would be, that the lands would be discharged; but the Court of Exchequer has said, unless you can produce the deed by which that release is made, the tithes, though not paid for a hundred years, must now be paid, because you cannot produce that deed. Then the Court of Exchequer will presume a loss of deeds in favour of an impropriate rector, but not in favour of the owner of the land: that seems so unlike equal justice that I cannot conceive how it could ever have been adopted.

All the circumstances of this case afford strong grounds for presuming that if the lands were subject to the payment of tithes after the Dissolution of the Monasteries, and if the title to the rectory and the title to the lands had passed to distinct

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he had not used the proper form of release, yet if he used words of release it would be the same thing as in a right of way, or any other right ; but where the fact is, that the lands and the tithes, as in this case, were at the same time in the same person, and that the lands were conveyed by that person, and conveyed before the rectory was conveyed, there is the strongest ground for presuming that the lands were so conveyed as discharged from tithes.

Either Sir John Packington must, after he conveyed the lands, have continued to receive the tithes, notwithstanding his grant of the lands, or he did not continue to receive the tithes ; if he continued to receive the tithes, then that must, in some way, have been capable of proof by evidence, that is, if the same receipt of tithes (which probably would have been the case) had been continued down to a late period ; whereas the evidence is the other way, that never, at any time, were tithes of these lands demanded by the person claiming the impropriate rectory under Sir John Packington. This is a circumstance very strong to show that either the lands were considered by Sir John Packington as discharged from the payment of tithes by some prior deed, and therefore conveyed by him as so discharged ; or, that if they were not so discharged prior, yet when he conveyed the lands he conveyed them as he held them, not subject to the payment of tithes.

If he made such a conveyance his subsequent conveyance of the rectory would not carry these tithes, because he had abandoned his title to them ; he had no right to convey them, and this makes it

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extremely important in this case to call on the Respondents for the production of their own title, that it may appear whether Sir John Packington, after he had conveyed the lands, did or did not convey the tithes of those lands: the presumption must be, that he did not convey the tithes, unless the contrary is clearly proved; the production of that conveyance might not indeed decide the question, because it might be conceived, in general words; it might convey the property to another part of his family, and possibly without exception of incumbrances, &c.

The Court of Exchequer seems to have proceeded upon the ground that they were only to look at the defence, that they had no occasion to look at the title of the Plaintiffs, and looking at the defence alone, on that they proceeded; and they held that that defence was not good, and why? because it would not be good against an ecclesiastical rector. Now I apprehend that there is such a clear distinction between an ecclesiastical rector and a lay impropriator, that reasoning applicable to the case of an ecclesiastical rector is not applicable to the

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claiming lands; the title is one and the same; of the same description; and particularly in the case of a person claiming any thing to be received out of the lands, or profit of any kind to be taken out of the lands. If a profit of any kind that is to be taken out of lands has not been taken for a vast number of years, and the lands have been enjoyed without yielding that profit to a third person, the consequence is, that the title to that profit shall be presumed to be discharged whatever is the nature of that profit. And what is the distinction between that case and the case of an impropriate rector claiming tithes? I can perceive none; and it seems, therefore, to me, that in this case, when all the circumstances are considered, even upon the defence,

would be impossible to hold that a Court of Equity had a right to make the decree which the Court of Exchequer has made.

The decision of the Court of Exchequer in this case is upon a legal right; they have said that the Plaintiffs in the suit in the Exchequer have a legal right to these tithes, unless the Defendant can show that they have it not. Now in what case is a Court of Equity authorized to decide on a legal right? There is no equity in the case of tithes; it is merely an incident to a right to an account. The person who claims in a Court of Equity a right to a decree for tithes, generally speaking, claims it merely as incident to a right to have an account of what the tithes are, or discovery from the Defendant of the tithes that have arisen from his lands, and then to an account of the tithes which have so arisen; and the equitable remedy is merely an

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incident to a right of discovery and account. In tithes there is no equitable right to sue for, any more than in any other species of real property. It is merely incidental, and arising from the nature of the particular thing that is demanded. It is not an original jurisdiction to decide a question of right; the Court of Exchequer had no right to decide the question; it is a legal question, which ought to be decided in a Court of Law, if there really is a question of right.

The Court of Exchequer, in this case, assumed the legal right, and entered simply into the question whether the Defendant has shown a ground to controvert that legal right. Now in this case the Plaintiffs not having shown a clear legal right, the Court of Exchequer had no right, as a Court of Equity, to decree the account as incident to a discovery of the quantity of tithes subtracted, which is the ground of the decree of a Court of Equity on this subject.

The equity in a case of tithes arising therefore only, as I conceive, incidentally from a clear legal title, where a clear legal defence is made in opposition to

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In the first place, I apprehend there never was a time when an impropriation could be made without providing, in some way, for the service of the church. After the 15th of Richard II. there must be an endowment of a vicar. Before the 15th of Richard II. there ought to have been either a vicar allowed, or the service of the church performed by a curate. Now what is the case here? There is no vicar; the church itself has fallen totally to decay; a great part of it has tumbled down, and the remainder of it was removed by the late impropiator. There must be, therefore, something with respect to this title which does not appear to the Court. There must have been, at some time, service performed at that church; even within memory burials have been performed; even within these twenty years persons have been buried in the churchyard in this parish, where, the Court say, the Plaintiffs in this case are entitled to all tithes, great and small. If there was an endowed vicar he must have something of the rectory; and it is incumbent on the rector to show what that endowment was, and how it was limited. It is true that the vicar might not be endowed with tithes; he might be endowed with a house, or with an annual payment; but the endowment, whatever it might be, ought to have been shown, in order to entitle the impropriate rector to the tithes. If the impropriation was before the statute of endowments it was not absolutely imperative by law to endow a vicar, yet there ought to have been some evidence given of the impropriation, the cause all, except, perhaps, very ancient impropriations, at least, I believe all the impropriations in the

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time of Edward the first had a vicar endowed.

A great many of the Pope's bulls for the purpose of impropriation expressly required that there should be a vicar endowed; because it was a subject of great clamour in the church that tithes were appropriated to monasteries, and no provision made for the due service of the church; and therefore it was frequently in bulls provided that there should be a vicar endowed. It is therefore extremely important that the actual impropriation should be shown, or that it should be shown that that impropriation took place before the time of legal memory. Before the Court decreed the payment of tithes, both great and small, some such proof of title ought to have been given. It is important with a view to the church itself. By proceeding without such proof of title in the case of a rectory impropriate, the protection which ought to be afforded to the church is disregarded. Some evidence should be shown to the Court that the rector impropriate is entitled to all the tithes, both great and small. The grant of the rectory impropriate is not conclusive as to the right, since the

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before the House on appeal nothing can be done. With respect to that which is before the House the Plaintiffs have not shown their title, and it is not admitted. They produce no evidence whatsoever of the fact of their title. They produce no evidence of possession according to their claim ; on the contrary, the evidence is directly against them upon the fact of possession. The evidence is also strongly against their right ; on the point of presumption they show no title by possession ; and upon a circumstance, which is considered slight, but which I hold to be important, a disclaimer by the improper rector of these tithes, the presumption is against the title.

Under these circumstances, therefore, the Court of Exchequer ought to have dismissed this Bill with respect to these lands, and directed that the Plaintiffs, the Respondents here, should file a new Bill, if they thought fit, stating their title, and proving it by the production of those documents which the Court ought to have required to be produced, and by showing how it has happened that there is not in this parish a vicar endowed, or a person acting as curate, or in a capacity of that description, for the service of the church, so that the church itself is now gone into decay, and this parish is loaded with the payment of tithes, having no church-duty performed in it, for which tithes were given : under these circumstances the claim of the Respondents requires to be supported by the strongest and clearest evidence ; and here there is an absence of all evidence, and the title is denied on the part of the Defendant. I think the proper way to dispose of

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this case will be to reverse the decree pronounced, as far as relates to these lands, and to dismiss the Bill as far as relates to these lands, leaving it to the Respondents to file a new Bill, with a direction that this decision shall not be pleaded in bar of the Plaintiff's title.

The Lord Chancellor :—In this case I withheld my final opinion till Monday morning, because I look upon it as a case of great importance, though it relates to a property of small value; yet in view it may not be of so much consequence as appeared to be when the learned Counsel addressed your Lordships. It had escaped me when I looked over the papers this morning, that the appeal was not against the whole of the decree, but that the Defendant's appeal is only against so much of this decree as relates to the tithes of the so-called Great Friars. The appeal is brought here for the purpose of controverting a doctrine (which has been understood as hitherto unsanctioned,) by arguments not affecting any decision of the House of Lords, but the doctrine of the Courts of Exchequer.

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alluding they did not mean to decide the point whether there was or was not a title in the Defendants, where they have refused to make a decree at the instance of the Plaintiff; and the principle applies not only to suits by lay impropiators, but also to suits by clerical persons. What they have said, as I understand them, in the case of *Scott v. Airey*, and other cases referred to at the bar, is this, that if a person shows that he has had a per-nancy or enjoyment of tithes; that he had not paid them to the rector, whether the lay rector, or the ecclesiastical rector; and can show by his title deeds that the tithes of his land have been made the subject of conveyances, to which, neither the lay rector nor the ecclesiastical rector, was (the latter could not, be) a party; the circumstance of the rector not demanding, whether a lay rector or an ecclesiastical rector, and the land owner asserting in his deeds a title to that which he was not only withholding, but enjoying, in cases attended with these circumstances, as I understand them, it has been determined by the Courts of Equity that it is not fit that they, being Courts of Equity, should make a decree, or interfere, but leave the party claiming to make out a title at law. On the other hand, with respect to a lay rector, where, unquestionably, it must be admitted that the claim is of what may be called a temporal inheritance, altogether different from the claim of an ecclesiastical rector; and when tithes in his hands having become lay property generally, are to be looked at as governed by the same principles as

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other property; it has been decided, that if the occupier of land can do no more than show that he has not paid tithes to the lay rector, the doctrine, that he shall not prescribe in *non decimando*, applies equally as in the case of an ecclesiastical rector. If he cannot show some title, or enjoyment of the tithes, which connect the title to him to tithes with that enjoyment, in that case he shall account for the tithes to a lay as well as to an ecclesiastical rector. This is the doctrine which was chiefly discussed and assailed at the Bar; and I believe that this appeal was brought with a view to overturn it; but it seems to me, that in looking at that great point they have overlooked the true point of the case; because, whether Courts of Equity have been right or wrong in the establishment of these doctrines, I apprehend that we are bound to suppose that in all cases in which they have applied them the Plaintiff has made out his title. The Plaintiff can only recover by force of his own title; and I agree with what has been stated by my noble friend on the other side of the House, that the Court ought not to call on the Defendant to

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Reading the evidence it does not appear to me that he has made out his title by proof.

But here we have an embarrassment, for the defendant does not appeal against that part of the decree which directs an account of the small tithes, generally, which according to the whole evidence the defendant never enjoyed; but submitting to account for the tithes of other lands, which is, *pro tanto*, admitting the rector's title, he does not submit to account for the tithes of the Lower Friars, which form the subject of the present dispute. I was startled when I first found this, because it struck me, as raising the question, whether he had not admitted the rector's title, but that opinion is much too strong if the justice of the case does not require me to give it.

The question then is, Has the Respondent shown a title so as to bring himself within the cases, and to make it necessary to discuss, for the first time, a case of this kind which has come to the House of Lords? Has he so proved a title as to make it necessary for us to discuss whether the species of decisions to which I have been alluding have been right or wrong? Now I apprehend the nature of the title he has proved is neither more nor less than this; the proof applies to enjoyment, and it applies also to the contents of certain instruments which are produced. With respect to enjoyment, he never enjoyed the tithes of this parcel of land which, as well as the rectory, belonged to a monastery. I take that to be material; and it is likewise in evidence that he did not enjoy the small tithes.

There is a statement in the answer which is not

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proved, but for which we cannot not help conjecturing there must have been some foundation. It is supposed that this impropriate rector, (who was the impropriate rector of a parish in which there was a church; in which, to this hour, there are the remains of a church; in which, to this hour, there is a burial place, and where, though the inhabitants can have no spiritual food in their lives, they may have rest when they are dead,) made a bargain with the parishioners, that if they would free him from the necessity of procuring service to be done at the church, he would make them a present of their small tithes. I do not know that there is distinct evidence of the fact, but there has been no service; and what the noble Lord has said is extremely important, with respect to the duty which attaches on the impropriator to provide for the religious service of the parish, both before and after that statute of the 15th of Richard II. Something, therefore, may be conjectured upon that ground, there having been no such enjoyment.

But it is said, although there has been no such enjoyment, here is the character of impropriate rector

the other were vested in ecclesiastical bodies, who might deal with each other in the manner which the learned Lord has pointed out; he gives no account whatever what became of this property from the time of the dissolution of the monastery till that deed, which, if I recollect rightly, is in the year 1642, a conveyance from Sir John to Thomas Packington; wherein it is described as the Rectory of St. Nicholas in Droitwich. But in the will of Thomas Packington how is that property described, which was taken under the deed? He devises it to his wife, together with all the tithes of corn, grain, and hay; why then, if previous to the dissolution of the monasteries these monasteries might have so dealt with each other as that tithes should not be demandable out of the estate, that might be so, but if that were not so, if the rectory was conveyed to Thomas Packington by Sir John Packington, and if Thomas Packington devises to his wife the rectory, that is, tithes of corn, grain and hay, and if from that day to this day the tithes of corn, grain and hay, that is, the great tithes, upon the whole of the evidence taken together were the tithes that were collected, I say, the person who claims under her must take as she claimed under her husband, and that the enjoyment is an enjoyment showing that she was entitled to the tithes of corn, grain and hay, but to nothing else.

I concur with the noble Lord in his statement, that after it has been shown that the Crown has granted the rectory, if there is possession and enjoyment on the one side, and on the other hand nothing to qualify or limit that possession

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and enjoyment, a presumption arises that deeds have been lost, and that the connection cannot be made out. But here, looking to the first written evidence of title, it is an instrument between the Packingtons, which shows that the rectory, with all profits that would belong to the rectory, great tithes and small tithes, and so on, were not the subjects to be taken under that deed.

After this conveyance I do not recollect a conventional deed of any kind being proved, and then you come to the enjoyment of Mr. Clieveland, who appears to have been the impropiator. Leases granted by him are in evidence, expressed in terms equivocal and ambiguous; but it is proved that he made a declaration, which has been treated as a matter of little importance, not only in the argument here, but in the judgment of the Court below. But to me it appears a declaration of very considerable consequence, because, if both as against an ecclesiastical rector and a lay rector, by asserting a title to tithes, in title-deeds and otherwise, the relief in equity for those tithes is prevented, what is that but a declaration made behind the back of the rector,

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taken as evidence that he had that which he excepts; but you must look at the circumstances of each case to know whether that was the meaning of it, and if you find he succeeded a person who declared he had not these tithes, you account for the exception, and remove the matter of doubt.

The inclination of my opinion is, that as this case stands before us, we have enough, without entering into the great questions that have been argued at the bar, to enable us to say that the Plaintiff has not made out a case to recover; that he has not gone far enough to raise the necessity of agitating the questions discussed at the bar, but that you may safely say his bill ought to be dismissed, without prejudice to any other bill being filed; and that notwithstanding the embarrassment arising from the Defendant's submitting to another part of the decree. I cannot at present foresee, even with the anxiety I have and profess to have not to disturb other cases, that I am likely, by reconsideration, to alter the opinion which I have now expressed.

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The *Lord Chancellor* :—In this case I propose to adopt the following judgment, because it appears to me that the circumstances of the case make it altogether unnecessary to examine, either by way of confirming or by way of weakening the doctrine of any of the cases that have been cited at the bar; I mean as to what is to be done in cases either of lay impropriators or ecclesiastical rectors, with respect to tithes of particular lands which have not been retained or enjoyed in perannuity under colour of title. In this case the Plaintiff's title

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was not admitted by the defendant; and the question is, Has the Plaintiff's case in this cause been so proved, not being admitted, as clearly to raise the question upon a colour of title in the cases to which I have been alluding? It appears to me, by examination of the evidence, that it certainly has not, and consequently it will be sufficient to reverse the decree, taking care, nevertheless, in the terms in which you give the judgment that the reversal of the decree shall not operate to the prejudice or the affirmance of any of the decisions which have been mentioned in the course of the argument at the bar.

The manner, therefore, in which you should proceed should be, "to reverse the decree of the Court of Exchequer, so far as the same is complained of by the petition of appeal." You will recollect that the Appellant submits to the decree as far as the tithes of other lands, including the small tithes, are concerned; and I mention the circumstance in order that it may be observed that we have not overlooked it, because it would be very difficult to account for this reversal

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mer decisions, against which I am extremely anxious this judgment should not operate at all; it ought therefore to be added, “but without prejudice to the Respondents demanding the said tithes in any other suit;” and therefore, if in any other suit, either by the admission of the defendant, or by the proofs in the suit, he shall so establish his title as to authorize him to insist, as far as he can insist, on a decree of the same nature, and on the same principles which have been adopted in the cases to which I allude, this reversal will not prevent his doing so; and of consequence this reversal so qualified will not prejudice those cases at all, at least it is not intended by this judgment either to prejudice or to give more effect to those decisions than they ought to have.

Die Lunæ, 9° Aprilis 1821.

After hearing counsel as well on Friday the 9th and Wednesday the 14th days of February, as Friday the 16th day of March last, upon the Petition and Appeal of Coningsby Norbury, Esq., complaining of a decree of the Court of Exchequer, of the 20th day of May 1816, made in two certain causes, in the first of which the Right Reverend Thomas Percy, Doctor in Divinity, deceased, was Plaintiff, and Coningsby Norbury, Esq. Defendant, by original Bill, and in the other the Right Honourable and Reverend Pierce Meade and Elizabeth his wife, and Samuel Isted, Esq., were Plaintiffs, and the said Coningsby Norbury was Defendant, by Bill of revivor, and praying that the said decree might be reversed, in so far as the same directs an account to be taken of the tithes which arose upon and from the lands called the Lower Friars, or that the Appellant might have such other relief in the premises as to this House,

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in their Lordships great wisdom, should seem meet; as also upon the Answer of the Honourable and Reverend Pierce Meade and Elizabeth his wife, and Samuel Isted, Esq., put in to the said Appeal; and due consideration being had on Wednesday the 21st day of February last, and on Friday last, and this day, of what was offered on either side in this cause, It is ordered and adjudged, by the Lords Spiritual and Temporal in Parliament assembled, That the said decree, so far as the same is complained of in the said Appeal, be and the same is hereby reversed. And it is further ordered and adjudged, That the original Bill in the said Court of Exchequer, so far as the tithes of the lands called the Lower Friars, in the occupation of the Appellant, are claimed thereby, be dismissed, but without prejudice to the Respondents demanding the same tithes in any other suit.

ENGLAND.

(COURT OF EXCHEQUER.)

1825. *

NORBURY - - - - - *Appellant*;
 MEADE and others - - - - - *Respondents*.

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A DECREE having been made upon a bill in Equity by a lay-impropriator for an account of tithes, the Defendant in the suit appeals against so much of the decree as relates to part of the lands made subject to the account. The decree is reversed, upon the ground that the Plaintiff in the suit has not proved his title; whereupon the Defendant in the suit presents a new appeal against the remainder of the decree: held that a second appeal in such a suit cannot be maintained. Whether such an appeal would be entertained in a suit where the question of title is in issue. *Quære*. A party having appealed against one part of a decree, in a suit where the title is not in issue, thereby virtually submits to rest of it, and cannot afterwards present a new appeal against other parts of the same decree. When such an appeal is presented the party served with it ought not to answer, but to present a counter petition to have it dismissed. If he treats it as an effective appeal by answering, and suffering it to proceed before he presents a counter petition, he will not be entitled to costs.

IN consequence of the opinion expressed in moving the judgment in the case last reported, the Appellant, on the 31st May 1821, petitioned the House of Peers for permission to present, during the then session of Parliament, a petition of appeal against so much of the decree as was not appealed against by the former appeal. The House, on the report of the committee, rejected that petition, but without prejudice to the Appellant presenting a petition in due time in the next session of Parliament.

* This case is introduced here out of the order of time on account of its connexion with the preceding case.

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On the 21st January 1822, the Appellant served notice on the Respondent's solicitors, of his intention to present a petition of appeal in the current session against so much of the decree as directs an account and payment by the Appellant of the small tithes the decree mentioned, and of the costs of the suit.

A petition of appeal was accordingly presented and, on the 15th February 1822, the House made an order that the Respondents should have a copy of the appeal, and put in their answer.

The Appellant entered into the usual recognizance for prosecuting his appeal, and on the 10th May 1822 the Respondents put in their answer to the appeal.

The Appellant then printed and delivered copies of his case, as required by the order of the House and also delivered copies to the agents for the Respondents, and set his appeal down in the paper for hearing.

In the mean time the Court of Exchequer had virtually suspended proceedings under the decree so far as related to the account thereby directed to be taken, and the payment of the costs taxed, until the House should have decided the second appeal for the Respondents, on the 28th of December 1820 before the House had decided on the first appeal applied by motion to the Court that it might be referred back to the deputy remembrancer, to apportion the costs taxed in respect of so much of the suit as was not the subject of appeal, which motion was opposed by the Appellant, and refused, with costs and on the 28th of July 1821, after the judgment on the first appeal, the Respondents having again moved for a similar order, it was again refused.

After these proceedings the Respondents presented

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to the House, praying that the second appeal be dismissed, with costs, on the ground, Appellant having by his former petition against a part of the decree only, he had thereby failed to the other part of such decree, and that therefore to be permitted now to appeal against the same. The Appellant insisted that he was not bound by his former appeal submitted in any respect to the decree, and that the Respondents had not taken objection by proper averments in their answer to the Appellants second petition of appeal, as they might have done if they meant to rest their case upon such alleged submission.

Appellant further insisted, that if he had been permitted to appeal against the decree, that upon the finding of any error in the judgment of the Court, he should be at any time at liberty to appeal against the decree, provided he presented such appeal within the time limited by the general order of the House, and had been done in the present appeal.

On these grounds the Appellant presented a petition, praying that the petition of the Respondents might be dismissed, and that he might be permitted to stand at the bar by his counsel upon the matter of the second appeal.

Petitions in the usual course were referred to a Select Committee, but the question of practice upon them being new, and of great importance, a Committee of the House was appointed to be heard before the House by counsel, and accordingly came on for argument at the bar.

Solicitor General, and *Mr. Roupell*, for the Respondents.

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Mr. H. Martin, and Mr. Simpkinson, for the counter petition.

For the first petition.—There is no instance of a petition of appeal to the House of Peers against part of a decree at first, and afterwards against the remainder of the decree; if such a practice could be permitted, the principle would extend to the admission of any number of successive appeals against the same decree, as where a number of moduses are pleaded, which would be dangerous and inconvenient in practice, and oppressively injurious to parties litigant. The grounds of objection in the new appeal and the old are precisely similar. The ground of defence, the defect of proof of title as impropiator, was apparent on the record, and open to the cognizance of the defendant at the time of the original appeal: If the practice of splitting appeals had existed, instances might be produced, and the absence of precedent is proof against the existence of the practice. If such a doctrine were established by the decision in this case it would lead to great oppression, delay and vexation.

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decree, it was reversed ; and the House gave leave to the Appellant to apply to the court below to vary the other part of the decree. So in another case † the House dismissed an appeal by consent of parties, declaring the order to be without prejudice to presenting a new appeal. If the House should reject the new appeal, there will be an inconsistency in the decree of the court below ; as to one part, the account of tithes will be refused, because the plaintiff has no title ; as to the other, it will be directed, although it will appear by the judgment of this House operating on the court below that he has no title. The whole ground of the Respondents claim is annulled by the judgment in the first appeal, and this proceeding is only a corollary from that judgment. There has been no acquiescence in any part of the decree ; and if the Respondents had intended to take this ground of objection, it should have been taken earlier. They have answered the second petition of appeal, and suffered the Appellants to proceed upon it, to print their cases, and act upon it for two years without objection. It is now too late to object.

† There has been no submission, actual or virtual, to that part of the decree which was omitted in the first appeal. No case has been found in which two appeals, at different times, against different parts of a decree, have been brought before the House ; but there are cases which furnish analogy and principle, which tend to show, that in the

Mr. Simp-
kinson.

† *Evclyn v. Evclyn*, 6 B. P. C. 114.

† The argument from this point is by Mr. Simpkinson. It is given distinctly, as well on account of the difference in the topics, as the novelty and importance of the case.

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opinion of this House an appeal against part of a decree is not an acquiescence in the rest of the decree : that appears by the case of *Roper v. Radcliffe*. The question in that case was, whether a devise, or bequest of money, to arise from the sale of land to a papist was a devise within the Acts relating to papists. Lord Harcourt held, that as the land was directed by the will to be sold out and out, it was not an interest in land within the meaning of these Acts ; that it was a devise or bequest of the surplus of money. Against that part only of the decree, the bequest of the surplus, an appeal was presented to this house. Upon argument, the House being of opinion that it was a devise of an interest in land within the meaning of the Popery Laws, the decree, so far as the appeal complained of it, was reversed : But after the declaration reversing the decree, the order of the House proceeds thus—
 “ And as to the payment of any of the simple con-
 “ tract creditors out of the money arising by the
 “ sale of the trust-estate, in case the personal estate
 “ should not be sufficient for the payment thereof
 “ no complaint thereof being made by the Appel-

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of the appeal, was in effect a direction to that Court to re-hear that part of the case which was before the House on the appeal. Suppose a party to have availed himself of this liberty, and the cause had been accordingly re-heard on the unappealed portion of the decree, and an order thereupon made by the Court below, would it have followed as a matter of course, that if the party had been dissatisfied with the order upon re-hearing, or any thing relating to the re-hearing, he might have applied to the House by way of appeal on that subject? In such a case there would of necessity have been two successive appeals against different parts of the decree in the same cause.

The proceedings in this House in another case* lately pending, illustrates the position, that an appeal against part of a decree is not to all intents and purposes a submission to the rest of the decree. In that case a bill was filed by a vicar for tithes. There were four townships in the parish: one called Shafton. The claim was by the Plaintiff, as vicar, of all the tithes, except a moiety of corn and grain. Lord Westmoreland, who claimed a portion of tithes in Shafton, was made a defendant with persons who were occupiers of lands in that township. Lord Westmoreland, by his answer, insisted that he was entitled not to a moiety, but to the entirety of the tithes of corn and grain in Shafton. The other defendants admitted occupation, and that they did had titheable corn and grain on their lands. Upon the hearing the bill was dismissed, with costs, as against Lord Westmoreland; and, as against the occupiers, an account was directed of the articles

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* *Drake v. Smith*, D. P. 1823. MS.

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of titheable produce specifically ; and the decree concluded with the general words, " all other tithes and matters and things demanded by the bill," which included the moiety of the tithes of corn. Against that part of the decree which directed an account of the tithes of hay, wool and lambs, and some other things, the defendants appealed to this House, but the part of the decree which directed a general account of all things demanded by the bill was left untouched by the appeal. When the case came before the House the discrepancy was discovered, and the House refused to hear the appeal until the decree was rectified. It therefore became necessary to apply to the Court of Exchequer to re-hear the case, and to have that part of the decree rectified, in order that the appeal might be brought before the House in a perfect state. But if appealing against part of a decree is an affirmation of the rest of the decree by the effect of acquiescence, no application could have been made to the Court below to rectify the decree ; for according to the argument the party had bound himself by virtual submission to the decree.

The effect of the order upon the former appeal

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to the party to raise the question, whether simple contract debts were well charged on the decree. It is nothing unusual when a decree is reversed if collateral parts of it are affected by the reversal, to give directions as to what is to be done by the Court below. It is a declaration, explanatory of the judgment of the House, to prevent a consequence, flowing from the reversal of the decree, which might be injurious to the parties, if no declaration were made, or direction given on the subject. In the case of *Drake v. Smith* the title of the Westmoreland was not properly brought before the House when the case was first brought for reversal on the appeal; and the House directed that the cause should go before the Court of Exchequer to make his title apparent in the cause, and to enable him to appear at the bar as a party in the appeal.

As to the supposed discrepancy between the order of the House on appeal and the judgment in the Exchequer, if there had been any decision upon the title in the appeal, the point might deserve consideration; but in this judgment of the House the question of title is decided; it is expressly reserved.

In the course of the argument the *Lord Chancellor* asked whether the decree was general, to which it was answered, that it was so as to the account.

Upon the argument, founded on the absence of any order of the House to exclude a second appeal in the same cause, he asked whether an instance of such an appeal could be produced. As to the effect of any acquiescence or

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agreement between the parties upon the subject; he said the objection must arise from the practice of the House, without regard to the arrangements or conduct of parties.

As to the argument, that after the judgment on the former appeal, if the decree for the small tithes should be suffered to stand, it might appear by the record that the Court of Exchequer had decreed the small tithes to a person having no title, *Lord Redesdale* observed, that the order on the former appeal was made without prejudice to any demand to be made by the Respondents in any other suit; that the House had expressed no opinion as to the parts of the case not then the subject of appeal, and that the cases were very different.

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Lord Redesdale:—I think the petition of appeal should be dismissed. The case came originally before the House on an appeal, which applied to the tithes of certain abbey-lands called the Lower Friars. The decree against which the appeal was made was upon a bill in which the Plaintiff sued in the character of impropiator, for a

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whether these lands called the Friars were exempt from tithes, as the Defendants contended: it appeared that the Respondents in that case had given sufficient evidence of their title to the owners of these lands, for a part of the evidence which they produced, and which proved their being in possession of all the tithes of the rest of the parish, excepted the abbey-lands, particularly of the tithes of all the other lands except the abbey-lands. There was also evidence of the usual receipt, (that is, receipt by letting the tithes) of all the tithes of the rest of the parish except the abbey-lands. It appeared, by the evidence of a person who claimed to be impropriator, that he had said that the abbey-lands were exempt from the payment of tithes. Upon this case, so appearing before the Court of Chancery, they thought fit to make a decree with respect to the abbey-lands, as well as the other lands in the occupation of the Appellant, for tithes generally including the small tithes. Now the ground upon which this House reversed that decree with respect to the abbey-lands was this, that the Respondent had not sufficiently shown a title to the tithes of the abbey-lands, but they had shown *prima facie* title to the small tithes of the other lands, and therefore the House having really nothing to do with respect to these lands on which it could make any order whatever, did not touch that part of the decree. The House was also doubtful as to the tithes of the abbey-lands. They therefore, in the order which they pronounced, declared that it should be without prejudice to the Respondents in the appeal claiming the tithes in any other suit. If

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the decree against part of which the Appellant now seeks to appeal with respect to other lands had been a decree establishing the title to the tithes, the question might be different; but it is a decree merely for an account, and therefore it is a decree without prejudice to the title. What was decided by the House on the former appeal was also without prejudice to the title; for the House, in the judgment which it thought fit to pronounce on that appeal, ordered that the decree, so far as the same was complained of, (that is, with respect to the abbey land being exempt,) should be reversed; and it was ordered, that the original bill, so far as it regarded the tithes of the Lower Friars, or claim thereto, should be dismissed, but without prejudice to the Respondents demand in any other suit. The parties therefore are in this situation, that the dismissal of the bill in the Court of Exchequer by the order of the House, does not prejudice the title; it prejudices the demand that was made in that suit, and it puts an end to the title of the Plaintiff in that suit with respect to the tithes of the abbey lands, but it does not determine that he has no

these lands ; but their defence was, that the Plaintiff was not entitled to these small tithes. Now the evidence did prove a *prima facie* title, and therefore was sufficient to ground the decree of the Court of Exchequer. Had they thought fit to present an appeal against the whole decree, the House might have determined the whole case. How it would be determined on the whole case I cannot now pretend to say, for the whole case has not been argued before the House. But as the party had the opportunity, if he thought fit, to have presented the appeal against the whole case, I think it would be extremely mischievous to permit a second appeal, in such a case as this, to be presented to the House. If it was a decree which concluded the title, that might be a question of separate consideration, but as it is a decree which does not conclude the title, but leaves both parties in the situation in which they would have been, except as to the account, I think there is no reason whatever for doing what does not appear ever to have been done before, permitting a second appeal to be presented by the same party, for the purpose of bringing the question again before the Court, with respect to the title which the Respondents in this case may have to the small tithes of the other land in the occupation of the Defendant, which is now the only subject of question.

Under these circumstances, therefore, it appears to me that this appeal ought to be considered as improperly presented, and therefore dismissed. It is not a case in which costs ought to be given, especially as the Respondents have thought fit to put in

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an answer to this appeal. They ought, immediately on the appeal being presented to have presented a petition to the House, praying that the appeal might not be heard: not having so done, it seems to me not a case in which there should be any costs given to the Respondents; I therefore move that the petition of appeal be dismissed without prejudice to any question of right, and without costs.

The Lord Chancellor :—I rise for the purpose of stating the question, whether this petition be or not received. I am quite satisfied that this second appeal ought not, under the circumstances, to be upheld. Whether, if the title had been brought into question, the appeal should have been received, I desire to withhold my opinion; that is a question of great importance, and I should be sorry to prejudge that question by any thing falling from me at present. I am satisfied that this petition of appeal should be dismissed. But the persons who complain of the petition of appeal have not done what they had an opportunity of doing. When the order was made for hearing the appeal they should have presented

SCOTLAND.

(COURT OF SESSION.)

Dr. JAMES ROBERTSON BARCLAY, } *Appellant*;
 of *Keavii* - - - - }

The Right Honourable WILLIAM }
 ADAM, Lord Chief Commissioner } *Respondent*.
 in the Jury Court of *Scotland* - }

AN entail in the prohibitory clause provided that it should not be lawful to sell, alienate, or put away the lands, &c.; nor to alter the course of succession; nor to contract debt, &c.; nor to do or commit any fact or *deed*, civil or criminal, whereby the lands, &c. might be adjudged, evicted, or forfeited, &c.; nor to permit the estate to be adjudged or affected for any debts or deeds contracted or committed by the grantor or the heirs of entail; It contained an irritant clause in the following words: "All which debts, *deeds* and "contractions are hereby declared null and void, &c."

The resolute clause provided that the heir in possession, if he should not redeem any adjudication which might be led against the estate for and upon the debts and *deeds* of, &c. should forfeit, &c.

Held, that the word "deeds" in the irritant clause does not apply to all the things enumerated in the prohibitory clause, but is restricted by the context to such deeds as are of a nature to create a debt or burden; that it refers especially to the debts and deeds previously prohibited, and cannot be extended to the prohibition against selling.

Upon a sale therefore by the heir in possession, an objection to the title by a purchaser, on the ground that the irritant clause struck at alienation, was held invalid.

IN the month of November 1820, the Appellant purchased from the Respondent certain lands situated in the county of Fife. By the agreement the Appellant undertook to pay 3,950 *l.* as the price

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of the estate; and the Respondent bound himself to execute and deliver to the Appellant a valid and sufficient disposition of the property.

Of the lands so purchased, certain parts, called Craigncate and Kingseat, are contained in the entail of the Blair Adam estate. These lands consist of about four hundred acres, and the proportion of the price corresponding to them was about 3,000*l*.

The Appellant having refused to pay this part of the price, on the ground that the entail of the estate of Blair Adam contained a prohibition against *selling*, the Respondent was proceeding to enforce the execution of the contract, when the Appellant presented to the Lords of Council and Session in Scotland, a bill of suspension, in which, after setting forth the terms of the agreement, he professed his readiness to implement all the obligations incumbent upon him, provided he could be assured that the Respondent was in a situation to give him a sufficient title to the lands which he had purchased.

The bill of suspension having been passed, the cause came to be pleaded before Lord Gillies; who ordained the parties to print and to lodge information

ions and limitations, as those contained in the deed executed by Mr. Littlejohn.

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The entail contains the following prohibitory clause: "That it shall be no ways lawful to the grantor and heirs of entail, to *sell, alienate, or put away* the lands, and others foresaid, or any part or portion thereof, *nor to alter the course of succession* above established, nor to *contract debt* above 500 l. sterling at one time, nor to *do or commit any fact or deed, civil or criminal*, whereby the said lands and estate, or any part thereof, may be anyways adjudged, evicted, or forfeited from me or them, or may be anyways affected in prejudice and defraud of the subsequent heirs of tailzie and provision successively, according to the order of substitution above specified; neither shall it be lawful for me nor them to *permit the said estate, or any part thereof, to be adjudged*, or affected for any debts or deeds contracted or committed by me or them, before our succession, or by any of our predecessors whom I or they may any way represent, or to which we, as their representatives, may be liable or subject."

Then follows an irritant clause in the following terms: "All which debts, deeds, and contractions are hereby declared *void and null* by way exception or reply, and without declarator, in so far as they may burden the said lands and estate."

After this irritant clause the prohibitory clause is resumed in the following terms: "Neither shall it be lawful for me, or the said heirs of tailzie, to permit the said lands and estate, or any part thereof, to be evicted, adjudged, or affected

applicable to this last prohibition. It is in the following terms: " And if I, or the possession, shall not redeem any adjudication may be led against the said estate, for the debts and *deeds* of the said deceased Alexander Littlejohn, or for the said sum of 500 £ within three years of the expiry of the such adjudications; then and in that case such heir, shall, for himself only, lose and his right to the said lands and estate; and be lawful to the next immediate heir or and if he shall neglect, to the next such heir, and so on successively, to redeem the estate, and use all the forms necessary in the of redemption, and to enjoy and possess the estate irredeemably thereafter, free of the and deeds of the preceding heir."

The entail afterwards contains a more extensive *resolutive* clause, which was admitted in every respect to be effectual.

The case was decided by the Court of Session on the 8th of February 1821, when the following interlocutor was pronounced: " U

in any irritant clause applicable to the sales or alienations of the lands in the said tailzie, and therefore find the letters orderly proceeded, and return."'

The Appellant, conceiving himself to be aggrieved by his interlocutor, presented his appeal.

For the Appellant—

The irritant clause is introduced at the end of the parts of the prohibitory clause to which it is applicable, and before the last branch of the prohibitions, because it is to that inapplicable. In order to render an irritant or resolute clause effectual it is not necessary to adopt any precise use of words; either of these clauses may be preceded by a minute recapitulation of all the different acts which have been previously prohibited, or by a general reference to the previous prohibitory clause in which such enumeration is contained; if a particular recapitulation is attempted, there should be no omission of any one act which is meant to be prohibited, since otherwise the court, consistently with recent authorities, will be disposed to conclude that such omission arises from design, and that the act so omitted is not meant to be comprehended under the irritant and resolute clauses. But an irritant clause, expressed in terms of general reference to the previous prohibitory clause, is equally effectual as if it contained the most minute recapitulation of particulars.

Thus, in the act of parliament 1685, c. 22, by which entails were first declared to be effectual against the creditors of the heir in possession, it was declared lawful "to his majesty's subjects to tailzie their

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“ lands and estates, and to substitute heirs in their
 “ tailzies, with such provisions and conditions as
 “ they shall think fit, and to affect the said tailzie
 “ with irritant and resolute clauses, whereby it
 “ shall not be lawful for the heirs of tailzie to sell,
 “ nailzie or dispoise the said lands, or any part
 “ thereof, or contract debt, or do any other deed
 “ whereby the samen may be apprised, adjudged, or
 “ evicted from the other substitute in the tailzie, or
 “ the succession frustrate or interrupted, *declaring*
 “ *all such DEEDS to be in themselves void and null,*
 &c. Here it will be observed, that after the enu-
 meration of several different prohibitions against
 selling, contracting debt, &c. the statute proposes
 the form of a general irritant clause, “ declaring
 “ such *deeds* to be void and null,” and by which
 the general term “ *deeds* ” is made to comprehend
 all sales, contractions of debt, alterations of the order
 of succession, and every other act previously pro-
 hibited.

In like manner this mode of expression has been
 adopted in many of the entails which the Court of
 Session have had occasion to consider. Thus, in the

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eds quairby the samen may be apprizit, adjudgit, evicht frae them, nor zit to do ony other thing in rt or prejudice of thir prests and of the foresaid lize and succession in hail or in part, *all quhilk* EDs sūa to be done by them, are bv thir prñts de- red to be null and of nane avail, force, or effect."

in the entail of the estate of Tillycoultry, was under the consideration of the Court of on in 1799, there was a prohibition against g, altering the order of succession, contracting or doing any other fact or deed, "civil or minal, by which the lands might be evicted;" the irritant clause following these prohibitions in these general terms: "All which *deeds* are t only declared void and null *ipso facto* by way exception, or reply without declarator, or in so as the same may burden and affect the foresaid ate, but also," &c. An objection was taken to resolute clause of that entail, but the parties not question the irritant clause. On the ary, it was distinctly admitted, that the irritant e expressed in these terms of general reference e prohibitory clause was perfectly sufficient.

r. the Respondent:—

entail with prohibitory and resolute clauses t effectual against the onerous deeds of the in possession, if it contains no irritant clause ring such deeds to be null and void.

is was settled by the decisions of *Baillie* against *Michael**, and *Gardiner*, &c. against *the Heirs ail of Dunipace*†. It has ever since been held to ed law, and is not disputed by the Appellant.

* 11 July 1734.

† 27 January 1744.

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The irritant clause in the present entail is not a general one, applicable to all the prohibitions, but specially and exclusively directed against the debts and deeds which are specified in the particular branch of the prohibitory clause which immediately precedes it; and therefore it has no relation to sales and alienations.

The prohibitory clause in the present entail consists of three distinct branches or members, each of which is introduced by the words, "It shall never be lawful," or "Neither shall it be lawful" to me or the heirs of entail. The first branch prohibits the heirs from selling, from altering the order of succession, and from contracting debt; the three restrictions which are essential to a strict entail. The prohibition to contract debt is not an absolute one, but is qualified in favour of the heir in possession, and that by words so ambiguous in their meaning as to give room for different interpretations. This branch contains also another clause, prohibiting the heirs "to do or to commit any fact or deed, civil or criminal, whereby the said lands and estate, or any part thereof, may

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estate ; and it was further foreseen that the lands might be adjudged for debts left by the entailer himself, or those which the entail permitted the heirs to contract.

But the two classes of debts last mentioned stand in very different situations. Those for which the heirs were liable at the time of their succession it was in the entailer's power, by proper prohibitory, irritant, and resolute clauses, to prevent from ever affecting the estate at all ; whereas, having no such power with regard to debts which he might contract himself and leave unpaid, or to debts which he had allowed the heirs to contract, it was necessary to guard against them in a different way.

Hence a separate prohibition, or member of the prohibitory clause, is applied to each class of debts. By one of these prohibitions it is declared not lawful for the heirs to permit the estate to be adjudged or affected " for any *debts or deeds contracted or committed* by me, or them, before our succession, " or by any of our predecessors, whom I, or they, " may anyways represent, or in which we, as their " representatives, may be liable or subject to." And as it was meant to prevent such debts or deeds from affecting the estate *at all*, there is added the irritant clause in question : " *All which debts, deeds, and contractions, are hereby declared void and null, by way of exception or reply, and without declarator, in so far as they may burden or affect the said lands and estate.*"

Then follows the third member of the prohibitory clause, declaring it unlawful for the heirs to permit the lands to be adjudged for the debts or deeds of

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the original entailer, Alexander Littlejohn, or ~~for~~ the sum of 500*l.* with which they are allowed ~~to~~ burden the estate. As no irritant clause similar ~~to~~ that applied to the former class of debts, could have been used here, a special resolute clause is immediately subjoined, declaring, that if the heir in possession did not within a certain time redeem an adjudication which might have been led against the estate for the entailer's debts, or the above 500*l.*, he should lose and forfeit his right to the lands.

The irritant and resolute clauses above mentioned, being specially applicable to particular prohibitions, left the entail defective, in so far as regarded the restrictions contained in the first branch of the prohibitory clause. The defect has been partly supplied by the insertion of a general resolute clause applicable to the whole prohibitions. But there is no additional irritant clause, the defect having so far escaped observation.

It is argued that the words "all which debts, deeds, and contractions," in the irritant clause, must be held to apply to all the things which had been previously prohibited, the word "*deeds*" in particular being comprehensive enough to embrace every act of the heir in possession, by which the estate may be alienated, or the order of succession altered: That this word *deeds*, when it has been used generally in an irritant clause, with reference to the prohibitions which have gone before, has always been held to comprehend every prohibited act: That the irritant clauses both of the Roxburgh and Tillicoultry entails were of this kind, and their efficacy would most certainly have been disputed

It has been thought possible to raise a question on this point: That in both those cases the word "deed" has been previously used in the prohibitory clause; a way which showed it to apply merely to feudal contingencies: That there is no good ground, therefore, for taking it here in a more limited sense, especially when there can be no doubt of the intention of the entailer that his estate should descend entire in the line of succession pointed out.

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The general intention of an entailer to preserve his estate to the series of heirs he has called, as manifested by his making a deed of the present kind, can be no reason for giving to particular words or expressions an interpretation different from their legal sense. Were such a mode of construction admissible, there is not one of the numerous entails which have been found ineffectual by the courts of law which would not have been sustained as effectual. There is not one where the general object of preserving the estate was not obvious, and where there were not words which, if taken in their most comprehensive sense, might not have been held to imply the restriction contended for. But this is not the rule of construction applicable to such cases. On the contrary it is *tritissimi juris* that the words in which restraints and limitations are imposed are to be strictly interpreted, and in no case extended beyond the limited signification, in which, according to the proper style of the deed, they are used.

It is also a rule invariably applied to the construction of such deeds, that the sense in which a word which admits of different meanings is to be

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taken, must be regulated by the context, and will be affected by the other terms with which it may be coupled in the passage where it is found. Thus a prohibition in which the word "dispone" is coupled with the words "sell and alienate" has been found insufficient to prevent a gratuitous disposition, by which the lands were conveyed away from the heirs of entail; and in the same cases the prohibition to "do" or "to grant any other deed whereby the lands might be evicted," was found ineffectual to prevent an alteration of the succession, because it was held as restricted to things of the same kind with those previously enumerated*.

Now the word deed, as used in this irritant clause, is not a single or insulated one, as in the Roxburgh or Tillicoultry entails. It is coupled with others, and placed betwixt two, which being specially and exclusively applicable to burdens of the nature of debt, leave no doubt as to the proper sense. The things declared null are "debts, deeds, and contractions." The deeds therefore in view must be such as are of a nature to create a debt or burden. The conveyancer, by adding the word *contractions*,

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very things which are supposed to have been already dismissed from his mind, as sufficiently designated by the term "debts." As the first and last are clearly of limited signification, the intermediate term, though more flexible in its nature, can only be taken in a sense consistent with that of its adjuncts. The whole form a complex expression, which cannot be understood to comprehend things of a kind altogether different from those denoted by any one of its terms.

The same inference is no less clearly deducible from the context which immediately precedes the irritant words. These do not, as in the Roxburghe and Tillicoultry cases, form a separate clause coming after all the prohibitions, and having no particular relation to any one. They are added to, and make part of, the second branch of the prohibitory clause, so as to have a special relation to what is contained there. The words, "all which debts, deeds, and contractions," refer to some debts and deeds which had been previously mentioned; and if there are to be found in the same member of the clause, and in the sentence immediately preceding, the words "debts and deeds," these must, according to every known rule of legal or grammatical construction, be held the proper antecedents of the pronoun "which," and it is not allowable to seek for them elsewhere. When the entailor, after prohibiting his heirs to allow the estate to be evicted "for any debts or deeds contracted or committed by me or them before our succession," immediately subjoins "all which debts, deeds, and contractions are hereby declared null," we cannot in sound construction

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hold the debts and deeds so annulled to be any other than those so contracted or committed by the heirs before their succession.

There occur, it is true, in the first branch of the prohibitory clause, the words *debts* and *deeds*. The heirs are there prohibited "to contract debt above 500*l.* at one time, or to do or commit any fact or deed, civil or criminal, whereby the land may be adjudged or forfeited." But so far is the occurrence of the words there from being a reason for extending the irritant clause to the whole prohibitions, that it affords the clearest evidence against its extending to any of them.

The entailor, while he was expressly leaving the heirs at liberty to contract debts to the extent of 500*l.* at one time, could never have thought of declaring the whole debts contracted by them to be null and void. This would have been quite inconsistent with the prohibition itself; and had an irritant clause been contemplated, as applicable to this species of debt, it must, it is evident, have been qualified in the same manner as the prohibition. It could only have declared the debts contracted by

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But if the irritant clause is not applicable to those restrictions in the first branch of the prohibitory clause in which the words debts and deeds actually occur, still less can it have any reference to the prohibition which respects selling.

A question as to the meaning of the word *deed*, when used in the irritant clause of an entail, was determined by the Court of Session in circumstances much more favourable for an extensive interpretation than the present (*Sir John Dick* against *Drysdale*.)^{*} But it was taken there in the restricted sense of feudal delinquencies, because this was the sense in which it had been previously used by the entailer.

For the Appellant, *Mr. J. P. Grant*.

For the Respondent, *Mr. Cranston*.

The *Lord Chancellor* :—I have fully considered this case, and, independently of the authority cited by Mr. Cranston (*Dick v. Drysdale*), I think the judgment ought to be affirmed.

Judgment affirmed.

* Fac. Coll. 14 Jan. 1812.

ENGLAND.

(EXCHEQUER CHAMBER.)

HENRY SMITH - - - *Plaintiff in Error.*The EARL OF JERSEY and } *Defendants in Error.*
others - - - - - }

A POWER reserved upon a marriage settlement to Tenant for life to grant or renew leases for lives, provided that a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by a lease for lives providing a re-entry in case the rent remains in arrears fifteen days, and there is no sufficient distresses on the premises.

B. M. being seised, &c. in fee of lands, &c. devised the lands, &c. to his daughter, *L. B.* for life, with remainders over; with a power to her in consideration of marriage, either before or after marriage, of revocation and appointment. *B. M.* died seised, without altering his will, leaving his daughter, *L. B.* seised of the lands, &c. for life, with power, &c.

L. B. intermarried with *G. V. V.*

Before the marriage, *L. B.* being seised as aforesaid, by

G. V. V. and L. B. from time to time during their respective lives, when and as they should respectively be in possession of the lands, &c. by indenture or indentures, under their respective hands and seals, attested by two or more credible witnesses, to demise such parts of the lands, &c. as now are leased for lives, or for years determinable on lives, in possession or reversion for lives, or for any number of years determinable on lives, so as there be not any greater estate or interest subsisting at any one time than what will wear out or be determinable on the dropping of three lives, and so as on every such lease there be reserved and made payable, during the continuance of the estates and interests thereby to be demised, leased, or granted respectively, *the ancient and accustomed duties and services, or more, or as great or beneficial rents, duties and services, or more, as now are, or at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable* for the same premises respectively, or a just proportion, &c. (except heriots, &c.) all such rents, duties, and services respectively, to be incident to and go along with the reversion and remainder of the same premises expectant on the determination of the respective demises, &c. and so as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved, and so as, &c. &c.: and also by indenture under hand and seal, attested as aforesaid, to demise all or any of the lands, &c. for any term absolute, not exceeding twenty-one years, to take effect in possession, &c. so as upon every such lease there be reserved, during the continuance of such lease, so much or as great and beneficial yearly and other rent, and services proportionably, as now is paid, or the best and most improved yearly rent, &c. without taking any fine, premium, or foregift, &c.; and so as in every such lease for any term of years absolute respectively, *there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof:* and also by indenture under hand and seal, attested, as aforesaid, to demise the lands, &c. wherein any mine, &c.

On the 5th September 1803, G. V. V. being seized of the lands for life, by an indenture of lease, in consideration of, &c. let premises, part of the lands, in settlement, which had been and were then under a lease for years determinable on lives, to C. S. and H. S., their executors and administrators, for ninety-nine years, if C. S., H. S. and J. S., or either of them, should so long live, yielding, &c. the yearly rent of 1*l.* at Michaelmas and Lady Day, and one couple of fat capons on, &c.

The indenture contained a covenant by the lessees for the payment of a proportion, &c.; and a covenant for the payment of the yearly rent of 2*l.*, and for the performance of the duties, &c. And also a proviso, "that if it should happen at any time during the estate thereby granted that *the said yearly rent or any of 2 l., and every or any of the duties, services, reservations and payments thereby reserved, or any part thereof, should be behind, unpaid, or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done, or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all arrearages thereof, if any be, may be fully raised, levied and paid, &c.; or if any default should be made in the payment or performance of all or any of the reservations, covenants and agreements thereinbefore contained, that then and from thenceforth, in all or any or either of the said cases, it should be lawful to and for the said G. V. V., his heirs and assigns, and the person and persons to whom the freehold*

And then were as great and beneficial as any which at the time of making the deed, or at any time thereafter, were or had been reserved in respect of the premises demised.

And that the usual and accustomed form of leases of the estate, contained in the settlement for lives or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the indenture of demise in question.

Held, affirming a judgment of the King's Bench, and reversing a judgment of the Exchequer Chamber, that the evidence from the former leases was properly admitted and introduced into the special verdict; and that the lease in question, according to the practice of conveyancers, was by implication within the terms of the power, and valid.

GEORGE, Earl of Jersey, Edward Ellice, and Alexander Murray, brought an ejectment in the Court of King's Bench in Michaelmas Term 1813, against Henry Smith, for the recovery of a tenement, with the appurtenances, called Tal-y-Coba-Uchaf, in the parish of Lansamlet in the county of Glamorgan, then in the possession of Henry Smith. There were two demises laid in the declaration; the first on the 11th July 1813, and the second on the 11th January 1814. Henry Smith defended and pleaded the general issue.

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At the Summer Assizes in the year 1815, the cause was tried before Baron Wood, at Hereford, when a special verdict was found, stating in substance as follows:—

That the Honourable Bussey Mansel, afterwards the Right honourable Bussey Lord Mansel, Baron Mansel, of Margam, in the county of Glamorgan, being seised in fee of the premises in the declaration

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mentioned, being a tenement called Tal-y-Uchaf, made his will, dated the 11th Dec 1749, by which he devised the said tene amongst other things, in remainder, after c limitations which never took effect, to his dau Louisa Barbara, for life, with remainders over a power to her in consideration of marriage, before or after marriage, of revocation and ap ment, as afterwards pursued by her in the d settlement hereafter mentioned.

That Lord Mansel died on the 29th of Nove 1750, seised as aforesaid, without altering hi as to the said premises, leaving his daughter, L Barbara, his only child him surviving, seised life of the said premises.

That the said Louisa Barbara, on the 20th J 1757, intermarried with George Venables Vern the younger, afterwards the Right honourab George Venables Vernon, Lord Vernon, Baron Kinderton, in the county of Chester.

That before the said marriage, the said Loui Barbara, being seised as aforesaid, by deed dat the 2d July 1757, in conformity with the ap

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t of waste, remainder to the said Louisa Barbara
ife, without impeachment of waste, and in the
a time to the said Francis Earl of Guildford
Charles Montague, and their heirs, to pre-
contingent remainders; and to permit the
George during his life, and afterwards the said
isa Barbara during her life, to take the rents,
and after the decease of the survivor of them,
vers other uses for the benefit of their issue;
in default of issue, to the use of the will of the
Louisa Barbara, and subject to the powers and
ations to be thereby directed and appointed;
n the mean time to the use of the said Louisa
ara, her heirs and assigns, for ever.

the said deed was contained a leasing power in
words: " Provided always, and it is hereby
ther declared and agreed, by and between the
l parties to these presents, that it shall and may
lawful to and for the said George Venables
rnon the younger, and Louisa Barbara Mansel,
intended wife, from time to time, during their
pective lives, when and as they shall respec-
ly be in possession of or entitled to the per-
tion of the rents and profits of the manors,
ssuages, lands, hereditaments and premises, so
ited to them for their respective lives as afore-
l, by indenture or indentures, under their re-
ctive hands and seals, attested by two or more
dible witnesses, to demise, lease, or grant such
t or parts of the said manors, messuages, lands,
ements and hereditaments, or parts or shares
nanors, messuages, lands, tenements, heredita-

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“ments and premises, whereof they shall be so
“respectively in possession or entitled to the per-
“ception of the rents and profits as aforesaid, as
“now are leased for life or lives, or for years deter-
“minable on the dropping of a life or lives, to any
“person or persons, in possession or reversion, for
“one, two, or three lives, or for any number of
“years determinable on the dropping of one, two,
“or three lives, so as there be not on any part or
“parcel of the same premises to be demised, leased,
“or granted respectively, for a life or lives, or for
“years determinable on the dropping of a life or
“lives as before mentioned, any greater estate or
“interest subsisting at any one time than what will
“wear out or be determinable on the dropping of
“three lives, and so as on every such respective
“lease, demise, or grant for a life or lives, or for
“years determinable on the dropping of a life or
“lives, there be reserved and made payable during
“the continuance of the estates and interests there-
“by to be demised, leased, or granted respectively,
“the ancient and accustomed yearly rents, duties,
“and services, or more, or as great or beneficial

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“ or may be varied, or altered or compounded for,
 “ according to the will and pleasure of the said
 “ George Venables Vernon the younger, and Louisa
 “ Barbara Mansel), all such rents, duties, and ser-
 “ vices respectively, to be incident to and go along
 “ with the reversion and remainder of the same pre-
 “ mises, expectant on the determination of the said
 “ respective demises, leases, and grants thereof, and
 “ so as there be contained in every such lease a
 “ *power of re-entry for nonpayment of the rent*
 “ thereby to be reserved; and so as the respective
 “ lessees to whom such lease or leases shall be made
 “ as aforesaid be not, by any express clause to be
 “ contained in any such leases respectively, freed
 “ from impeachment of waste; and so as the said
 “ respective lessee or lessees, to whom any such
 “ lease or leases shall be made respectively as afore-
 “ said, doth and do seal and deliver a counterpart
 “ or counterparts of such lease or leases respec-
 “ tively: and also by indenture or indentures under
 “ their respective hands and seals, attested as afore-
 “ said, to demise, lease, or grant all or any of the
 “ said manors, messuages, lands, hereditaments and
 “ premises, and parts and shares of manors, mes-
 “ suages, lands, hereditaments and premises, or any
 “ of them, so limited to them the said George
 “ Venables Vernon the younger and Louisa Bar-
 “ bara Mansel, his intended wife, for their respec-
 “ tive lives as aforesaid, for any term or number of
 “ years absolute, not exceeding twenty-one years,
 “ to take effect in possession, and not in reversion, or
 “ by way of future interest, so as upon every such

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“ lease for an absolute term not exceeding twenty-
“ one years there be reserved and made payable,
“ during the continuance of such lease or leases, so
“ much or as great and beneficial yearly and other
“ rent and rents, and other services proportionably,
“ as now is and are therefore paid and yielded, or
“ the best and most improved yearly rent and rents
“ that can be reasonably had or obtained for the
“ same, without taking any fine, premium, or fore
“ gift, or any thing in the nature or in lieu thereof,
“ to be incident to and go along with the reversion
“ and remainder of the same premises expectant on
“ the determination of the said respective leases; and
“ so as the respective lessees, to whom such lease or
“ leases shall be made, be not, by any express clause
“ to be contained in any of such leases respectively,
“ freed from impeachment of waste; and so as the
“ said respective lessee and lessees, to whom any
“ lease or leases shall be made respectively as afore-
“ said, doth and do seal and deliver a counterpart or
“ counterparts of such lease or leases respectively;
“ and so as in every such lease for any term of year
“ absolute respectively there be contained a clause

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“ Louisa Barbara Mansel, his intended wife, for
“ their respective lives as aforesaid, wherein or
“ whereupon any mine or mines now is or are open,
“ or wherein or whereon any person or persons shall
“ be willing to open any mine or mines, sough or
“ soughs, or other thing or things whatsoever, which
“ may be requisite and necessary for the digging
“ and getting of lead or copper ore, or any metal or
“ mineral whatsoever, unto any person or persons,
“ for any term or number of years not exceeding
“ thirty-one years, to take effect in possession and
“ not in reversion, or by way of future interest; and
“ so as upon every such lease for an absolute term,
“ not exceeding thirty-one years, there be reserved
“ and made payable, during the continuance of such
“ lease or leases, such part or share of the lead, cop-
“ per ore, coal, and other produce to be gotten from
“ the said mines, or such yearly rent or income in
“ respect thereof, as can reasonably be had or obtain-
“ for the same, without taking any fine, premium or
“ foregift, or any thing in the nature or in lieu thereof,
“ to be incident to and go along with the reversion
“ and remainder of the same premises expectant, on
“ the determination of the said respective leases;
“ and so as the respective lessees to whom such lease
“ or leases shall be made, be not, by any express
“ clause to be contained in any of such leases re-
“ spectively, freed from impeachment of waste, other
“ than in the necessary and reasonable winning or
“ working thereof; and so as the said respective
“ lessee and lessees, to whom any lease or leases
“ shall be made respectively as aforesaid, doth and

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“ do seal and deliver a counterpart or counterparts
“ of such lease or leases respectively ; and so as
“ there be also inserted such proper and usual cove-
“ nants for the effectually winning and working the
“ said mines and smelting the ore, and doing all
“ other proper and necessary acts, as are usually
“ inserted in leases of the like nature.”

The said George Venables Vernon after the said marriage became seised for life of the said premises, and entitled to the receipt of the rents, &c.

Before the making the said deed of settlement, and until the surrender hereafter mentioned, the said premises were under lease for a term of years determinable on the lives of three persons, who died before the 11th day of July mentioned in the declaration.

On the 5th September 1803, the said George Venables Vernon being seised of the said premises as aforesaid, and entitled to and in receipt of the rents, &c. by an indenture of lease between him (then Lord Vernon) of the one part, and Charles Smith (since deceased), and the said Henry Smith of the other part, in consideration of the sur-

them, should so long live, yielding therefore to the said Lord Vernon, &c. the yearly rent of 2 *l.* at Michaelmas and Lady Day, and one couple of fat capons on the first of January yearly, during the term, or 1 *s.* 6 *d.*, in lieu, at the election of Lord Vernon, &c., also the heriots and services in the said indenture specified.

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The said indenture contains a covenant by the said lessees for the payment of a proportion of the said reserved rent, in case the term should determine between any of the days of payment by the death of the persons named in the said lease; also a covenant by the said lessees for the payment of the said yearly rent of 2 *l.*, and for the performance of the duties, heriots, suits, services, &c. at the times and in the manner limited and appointed in the said lease. And the said lease contains a proviso in these words: “ Provided always, that if it shall
“ happen at any time during the said estate hereby
“ granted, that *the said yearly rent or sum of 2 *l.**
“ *and every or any of the duties, services, reser-*
“ *vations and payments hereby reserved, or any*
“ *part thereof, shall be behind, unpaid, or undone,*
“ *in part or in all, by the space of fifteen days*
“ *next over or after any or either of the days or*
“ *times whereat or whereupon the same ought to*
“ *be paid, done, or performed as aforesaid, and no*
“ *sufficient distress or distresses can or may be had*
“ *and taken upon the said premises, whereby the*
“ *same and all arrearages thereof, if any be, may*
“ *be fully raised, levied, and paid, or if the said*
“ Charles Smith and Henry Smith, their executors,

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“ administrators or assigns, or undertenants, or any
“ of them, shall suffer and leave the said premises,
“ or any part thereof, to continue in decay or
“ repaired, by the space of six calendar months
“ next after such view had, and notice given or let
“ as aforesaid, or shall do or commit, or cause or
“ suffer to be committed or done, any wilful waste,
“ spoil, or destruction in or upon the said premises,
“ or any part thereof, or shall at any time during
“ the said term grind any part of their corn or
“ grain at any other mill than such mill so to be
“ appointed by the said George Lord Vernon, his
“ heirs or assigns, or such person or persons to whom
“ the freehold or inheritance of the premises shall
“ as aforesaid belong (the same being in repair and
“ order to grind such corn and grain,) or if the said
“ Charles Smith and Henry Smith, their executors
“ and administrators, or any or either of them, shall
“ at any time during the estate hereby granted
“ give, grant, bargain, sell, assign, or otherwise de-
“ part with this present demise and lease, or with
“ their or either of their estate or interest herein,
“ without the license and consent of the said George

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n their parts contained, that then and from
henceforth, in all or any or either of the said
ases, it shall and may be lawful to and for the
aid George Lord Vernon, his heirs and assigns,
nd the person and persons to whom the freehold
r inheritance of the premises shall as aforesaid
elong, into and upon the said premises hereby
emised, and into every part and parcel thereof,
holly to re-enter, and the same to have, hold,
etain, possess, and enjoy, as in his and their
ormer and proper estate, against the said Charles
mith and Henry Smith, their executors, admi-
istrators or assigns, these presents, or any thing
erein contained to the contrary thereof in anywise
otwithstanding."

The said lease does not contain any other than
above-recited power of re-entry for non-payment
the rent reserved. The said Charles Smith and
enry Smith executed and delivered a counterpart
the said lease.

The rents, duties, reservations and payments re-
ved by the said indenture, and secured by the
der, covenants, and power of re-entry therein
ntained, at the time of making the said indenture,
re ancient and accustomed, and then were as great
d beneficial as any which at the time of making
deed of 2d July 1757, or at any time there-
er, previous to making the said indenture of 5th
ptember 1803, were or had been reserved, in
pect of the said premises demised by the said
lenture.

The premises demised by the said indenture, and

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the premises mentioned in the said declaration, in the same.

The usual and accustomed form of leases of the estate, contained in the said settlement of 2d July 1757, for lives, or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the said indenture of 5th September 1803.

All the rents, duties and services reserved by the said indenture, which accrued in the lifetime of Lord Vernon, have been discharged and performed, and the said Henry Smith has been ready to pay and perform all things that would have accrued to this time, supposing the said indenture to have continued in force and undetermined.

The said Charles Smith died on the 1st January 1813; the said Henry Smith and John Smith are still living.

The said Louisa Barbara, by virtue of the said powers to her granted, made her will, dated 5th August 1783, duly attested, signed and published, and thereby devised the said premises, subject to the estate for life of her said husband therein, unto

nry Villiers was seised in fee of the said remainder, subject to the said life-estate of the said Lord Vernon.

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By indentures of lease and release, the former bearing date the 4th January 1812, and the latter

6th January 1812, the said William Augustus nry Villiers, being so seised of the said remainder aforesaid, conveyed the same to George Earl of Jersey, Edward Ellice, and Alexander Murray, who thereupon were seised of the said last-mentioned remainders.

Lord Vernon afterwards, and before the 11th of May, the day mentioned in the declaration, died, whereupon the said George Earl of Jersey, Edward Ellice, and Alexander Murray, were seised in fee of the said premises.

The special verdict then finds the leases by the said George Earl of Jersey, Edward Ellice, and Alexander Murray, the lessors of the plaintiff, in support of the several demises in the first and second counts of the declaration mentioned, also the entries and ousters as in the declaration mentioned, and concludes in the usual form, referring the matter to the court.

This special verdict was argued before the judges of the Court of King's Bench, at Serjeant's Inn, at sittings holden there before Michaelmas Term 1821, and in the ensuing term the Court pronounced their judgment for the defendant.*

From this judgment the plaintiffs brought their writ of error into the Exchequer Chamber, where

* 5 Maule and Selwyn, p. 467.

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the case was twice argued, and four of the Judges of that court being of opinion for a reversal, and three for an affirmance of the judgment of the Court of King's Bench, that judgment was reversed accordingly*. From that judgment of reversal the original defendant brought a writ of error returnable in parliament, praying that the judgment of reversal might be reversed.

For the plaintiff in error :

1st. The intention of the donor of a power is to be collected from the whole of the deed whereby that power is created ; from the plan and design of it as well as the words, and also from the circumstances of the property which is by him subjected to the operations of that power ; and in the construction of the particular instrument executed under such power, the law will expound it with an inclination to preserve rather than to destroy the instrument, "*ut res magis valeat quam pereat*;" "It is the office of a judge to preserve, not to destroy an estate." †

2d. The only objection raised to the lease under which the plaintiff in error holds is, that the proviso for re-entry therein contained is not such as is required by the leasing power under which it was granted by Lord Vernon, as not being absolute, unconditional, and capable of being enforced *instantly* upon every default of payment of rent, on the very day on which such default takes place ; but the words

* 1 Bing. and Brod. p. 97 ; 3 Moore, p. 339.

† See *Cotter v. Merrick*, Hardr. 93, per Parker, Baron.

the power do not require a proviso for re-entry absolute, unconditional, and capable of being enforced *instanter*, such words being only "so as there be contained, in every such lease a power of re-entry for nonpayment of rent." It is undoubtedly a condition precedent to the due execution of the leasing power, that there should be reserved in all leases granted under such power "a power of re-entry for nonpayment of rent;" but in what terms that power of re-entry is to be reserved the settlement is wholly silent, and the argument for the Defendant in error is, that from the non-expression of any terms in which that proviso is to be framed, it necessarily results that the comprehensive expression, "a power of re-entry" (which comprehends and includes every proviso of re-entry adapted to the object for which it is required,) must be narrowed to one particular proviso for re-entry, absolute, unconditional, and capable of being enforced *instanter* upon every default. But the expression "a power of re-entry" is no description of the particular term, though it is of the general object of the condition to be introduced into the lease, and the language of the leasing power is fully satisfied by a proviso for re-entry such as is contained in the lease now sought to be set aside by Lord Jersey, which, though not an absolute, unconditional proviso, and capable of being enforced *instanter* upon every default, is nevertheless "a power of re-entry," sufficient for the object for which it was required, such as was in use upon the estate to which the leasing power applies at the time when it was created, and, such as the general term used in the leasing power,

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so far from either expressly or impliedly disapproving, seems advisedly to sanction, especially when it is recollected that in a subsequent part of the same leasing power, as applicable to the rack-rent estates, the donor of the power omits the general and larger term, "a power of re-entry for non-payment of rent," and specifically chalks out the very power to be introduced into such leases, viz. "a clause of re-entry, in case the rent to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof." Thus, in this latter case, where large rents were to be secured, defining the extent of indulgence to the tenant, and furnishing the very clause to be introduced, as contra-distinguished from the more general and comprehensive expression previously used, viz. "a power of re-entry for non-payment of rent." Can it be successfully contended that this expression conveys a perfect idea to the mind of the nature and form of the power of re-entry required? It points out, indeed, distinctly the wish of those who framed the settlement that there should be some power of re-entry in all leases

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rally attended to in the lease executed under such
 ver, the next consideration will be, whether the
 it also is preserved; or whether there be any
 ng in the plan and design of such leasing power,
 l the circumstances of the property to be leased,
 ich, by disclosing a different intention in the
 or of the power from that which occurs on the
 re reading of the words themselves, thereby im-
 es a different construction upon such words. The
 es under the power are of three sorts. First,
 es for lives, or determinable on lives, which are
 ewable on fines, and where the rents reserved are
 ninal: secondly, leases for years, where a rack-
 t is reserved: and thirdly, mining-leases, in which
 reservation of a power of re-entry is required.
 e lease in question is of the first sort, and the
 viso therefore for re-entry rather introduced with
 iew of enforcing regular acknowledgment of the
 ancy, than of securing a succession of large pay-
 nts at stated periods. It is not improbable, there-
 a, with such an object, that some discretion should
 left to the person by whom the power was to be
 cuted as to the form of the proviso. If the words
 he leasing power allow such discretion, is there
 reason on which its exclusion can be founded?
 he security of the nominal rents endangered by

Are the acknowledgments of a subsisting ten-
 y less likely to be regular in a case where the pro-
 ty of the tenant, if hazarded by irregularity, is
 arded to so great an extent as that of the loss of
 aluable lease for lives held under a nominal rent,
 n where it consists only of a short term at a rack-
 t? On the contrary, considering that two objects

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must have been present to the mind of the framer of the leasing power : first, the securing the rents to those who were to benefit by them ; second, the preservation of the estate in good condition when the lease determined : has not the language of the power been designedly varied, when directing the reservation of the right of re-entry in the two sets of leases? In the leases for lives, where a small proportion of the annual value is to be paid in the shape of rent, and where a distress might be resorted to without injury to the estate, a mere reservation of the right of re-entry is required, in such manner and form as should be found discreet and beneficial, and adapted to the object in view ; but in the rack-rent leases a precise and well defined clause of re-entry is pointed out, because the interest of both tenant for life and remainder-man is materially consulted in the reserved power of re-possessing themselves of land for which the lessee is not able to pay the rack-rent within twenty-eight days from the time of its becoming due; and where a distress taken for such rent, if resorted to, would probably not secure the rent, but certainly injure the cultivation of the estate.

4th. If the literal language of the condition be not violated, and there be nothing in the spirit of the leasing power giving a meaning beyond the words used, the principle which has hitherto governed in cases of this kind must govern in this case, which is that where a special clause of re-entry is prescribed by the power, that clause cannot be departed from, even in trivial circumstances, without defeating the lease made under the power ; the donor of the power being in this respect the legislator, and having a

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right to impose any condition precedent he pleases, provided it be not inconsistent with law, and which, when once plainly expressed by him, is not subject to any examination of its reasonableness or unreasonableness. But if no special clause be furnished by him, but merely a direction given that certain leases shall contain "a power of re-entry," then if a clause reserving the right of re-entry be inserted, the will and direction of the legislator is complied with, unless the power be executed in a fraudulent or illusory manner, which neither law nor equity would hold to be any compliance at all. Such is the true result of *Core v. Day**, explained as that case is by the subsequent decision in this case, when in the Court of King's Bench, of two of the same learned Judges who signed the certificate in *Core v. Day*; for in that case the power having prescribed a particular clause, that is, in the event of the rent being behind a specified number of days, those learned Judges held a proviso for re-entry, which added terms not used in the particular clause prescribed by the power to have vitiated the lease. But in this case the settlement only requiring "a power of re-entry for non-payment of rent," and the lease containing the clause of re-entry in question, they considered the words of the power to have been complied with, such compliance being not only literal, but not impeachable on the ground of any fraud or contrivance, and, on the contrary, fair and reasonable.

5th. In considering whether the lease be bad on the ground of any excess in the indulgence given to

* 13 East, 118.

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the tenant, where the power, as in this case, prescribes no precise clause of re-entry, it is most material to ascertain what was the indulgence granted in leases of this estate prior and subsequent to the settlement creating this power. No such inquiry, it may be safely conceded, can be admitted where the precise clause is prescribed by the power; but where the power is silent as to the particular nature of the condition, if it follows from thence that some discretion is to be exercised by him who executes the power in framing the condition, the discretion heretofore sanctioned by the donor of the power, who if she had spoken, must have been obeyed, is fit evidence to guide the judgment where she has been silent. It seems difficult to maintain by argument, that where, by the terms of the condition, reference is made to prior leases impliedly, as where "ancient" or "accustomed rents, or rents as beneficial as the ancient rents," are spoken of, such evidence is not admissible to ascertain either the propriety of the new rents as compared with the old rents in amount, or the propriety of the mode in which they are reserved or secured as compared with the ancient mode of reserving or securing them. But it is said, there is no implied reference in the very words directing the reservation of the power of re-entry. If however the words "a power of re-entry for non-payment of rent" embrace every power of re-entry, properly so called, then some assistance is necessary to ascertain what particular power of re-entry should be introduced, and none better can be had than that which the leases prior and subsequent to the settlement furnish, as directing

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the will of her whose will alone is to be consulted on the occasion : and though it is clear that her will of to-day cannot be contradicted by her will of yesterday or to-morrow, yet it is equally clear that those who contend that such will must be the sole guide, must be content to find it elsewhere if they cannot find it in the power itself. For however general the power in its terms, it seems not more repugnant to reason to contend that the execution thereof is thereby left absolutely to the tenant for life, since that would destroy the condition altogether, than to contend that the very generality of the words confines its execution to one, and one only form of proviso for re-entry, and that of the narrowest and most limited form. But upon sound reasoning it must be conceded, that in such case the limit to the exercise of discretion by the tenant for life must be sought for, either in the arbitrary rules of law, or in such facts as are fit to regulate the decision of the law ; and as in the same power, for a different object, *viz.* the reservation of the rent, the settler has himself impliedly referred to former leases, why may he not be considered also, in this particular, as referring to former leases, and therefore framing the power in general terms ? Either that must be the conclusion, or some more unsatisfactory source of evidence must be introduced, or there must be no limit to the discretion of the tenant for life, or the power must be narrowed to something less than its terms by some supposed will of the settler, not evidenced either by his words or his acts. The evidence therefore admitted at the trial was properly admitted,

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and the result drawn by the jury a matter of much weight in the consideration of this case:

6th. If the terms of the power be such as to leave the terms of the proviso unfettered by positive direction, there seems little reason to quarrel with the extent of the indulgence, in point of time, granted to the lessee; and such has been the concession throughout the argument of this case. Much more fault has been found with the latter qualification of the proviso, by those who have argued for the defendant in error, viz. with that part which restrains the right of re-entry to the case where no sufficient distress or distresses may be had or taken upon the premises. The reasonableness of this qualification, as applied to the particular rents reserved in these leases, and the nature of the property leased, has been already pointed out: in addition however it is to be observed, that the statute law has not only spoken the same language, but it may be doubted whether it has not restricted all lessors from exercising any right of re-entry not guarded by this reasonable qualification. The 4th Geo. II. ch. 28. s. 2, provides, that as often as it shall happen "that on " half year's rent shall be in arrear," the lessor " shall and may" without any formal demand or re-entry, serve a declaration in ejectment for the recovery of the premises; and in case of judgment against the casual ejector, if it shall be made appear to the court that half a year's rent was due before the declaration was served, " and that no sufficient " distress was to be found on the demised premises," and that the lessor had power to re-enter, then he

shall be entitled to judgment and possession. It then proceeds to bar all relief against such judgments, except on payment of such rent and arrears, together with full costs, within six months. The interests of the lessor and the lessee are by this statute equally provided for : the former is relieved from the formalities of the old common-law entry ; the latter is protected against the forfeiture of his interest, in case there be sufficient to satisfy the rent by way of distress upon the premises. The Legislature has thus recognized the reasonableness of a provision preventing forfeiture, where there is a sufficient distress, and so far affords a strong argument in favour of the clause for re-entry contained in the lease now under consideration. But has it not gone farther ? Do not the words speak imperatively that no re-entry shall be enforced where there is such sufficiency of distress ? The language of the 8th and 9th W. III., respecting the breaches to be assigned upon bonds, is not so strong ; for there the Legislature only says the plaintiff “ may ” assign as many breaches as he shall think fit upon the bond, giving the defendant the opportunity of paying the money into court after judgment and before execution. But the courts of law have construed this statute as imperative upon the plaintiff to do what he is there told he “ may ” do ; whereas in the 4 Geo. II, the language is “ *shall and may* : ” and as in both statutes the object is the same, *viz.* to relieve the subject from the necessity of seeking the aid of a court of equity against the technical difficulties of the common law, why should not this equitable provision in

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each statute be construed to be a compulsory provision, and especially in the statute of Geo. II. where it is introduced with the words "shall and may?" If it be a compulsory provision, applicable to all cases of re-entry, and not confined to cases of re-entry under that statute, then the clause in question conforms itself to the law, and no more: if it be applicable only to cases under the statute, then, by analogy thereto, this leasing power is reasonably executed, being qualified in its execution by what the law of the land has deemed reasonable, and being from the terms in which it is penned open to such qualification.

For the Defendants in Error:

1st. The leasing power in the marriage settlement of 1757 (a power granted by a person having the absolute dominion of the fee to a purchaser of a life-estate), expressly requires that the leases shall contain "a power of re-entry for non-payment of the rent thereby to be reserved," which makes it necessary, that the right to re-enter should attach immediately on the rent being unpaid; whereas the lease under which the Defendant in the ejectment claims,

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drawn? If it be allowable to deprive the reversioner of any part of that right of re-entry which the creator of the leasing power says he shall have, of what part may he be deprived? Only two lines can be drawn, either the tenant for life is obliged to reserve the whole right of re-entry, or no part of it. And as the latter rule cannot be supported, it follows, that the right of re-entry in the lease should be fully commensurate with that required by the leasing power, and that this lease is void as an execution of that power.

2d. The lease in question is liable to the further objection, that the leasing power requires that the lease shall contain "a power of re-entry for non-payment of the rent thereby to be reserved," whereas the lease contains no such power, but only gives the lord a right to re-enter for the absence of distress for rent unpaid. The meaning of the words of the leasing power is perfectly plain and unequivocal; "a power of re-entry," means something enabling a man to re-enter, and "a power of re-entry for the non-payment of the rent" signifies something enabling a man to re-enter on the occasion, or for the cause of non-payment of rent; now the lease in question certainly does not enable the reversioner to re-enter on such occasion, or for such cause; inasmuch as the whole rent for any number of years may be unpaid, and yet he may not be enabled to re-enter. In the case of *Core v. Day**, this point was expressly decided.

3d. It is said, in support of the lease, that the

* 13 East, 118.

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creator of the power has used very general language, that *a* power is required, without saying what power; and that the power of re-entry in this lease is sufficient, because it is a reasonable power, and was usual on the estate. It is true, the language of the leasing power is general, so general, that only one quality is specified, which the power of re-entry is required to have, *that it should be for non-payment of rent*; but the creator of the power having exacted this one condition only, is certainly no reason why a compliance with that condition should be dispensed with. The leasing power requires that the power of re-entry should be *for non-payment of rent*, and it does not require that it should be usual or reasonable; why then should the leasing power be so construed as to dispense with the former condition, which by its terms is annexed to its execution, and to exact a compliance with the latter which is not so annexed. Besides, it is not found that this conditional clause of re-entry is reasonable, or that it is usual generally; it is only found to be usual on the estate, which is not only not the same thing as usual generally or reasonable, but may be the direct contrary. The generality of the word *a*, (relied on in support of the lease) must certainly exclude a reference to any particular class of clauses of re-entry, such as those on this estate, as nothing can be more opposite to a general word than a word of reference. If this leasing power be construed to require the power of re-entry usual in cases of the lands comprehended in the settlement, although in this particular case this construction will operate to the advantage of the lessee, yet

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it may in other cases be productive of the greatest inconvenience to him. Suppose a lease under a power, in the terms of this leasing power, to be on the face of it conformable to the power, yet if this construction prevail, the reversioner will have a right to avoid the lease, if he can show that the clause of re-entry is different from that which is usual on the estate comprehended in the leasing power. The inconvenience to both parties will be extreme, if a lessee cannot be sure that he has a valid lease, by comparing his lease with the power, without inspecting all the leases formerly granted of lands within the same estate. It is submitted, that what the grantor of a power has required, must be done for this one reason, of itself sufficient, that it is required, and that it is a much safer rule to adhere to that condition which is expressly annexed to the execution of a power by one who has all the circumstances of the property before him, and who has the right to enlarge or narrow the power to any degree, than to substitute for what he has exacted something which it may be conjectured he ought to have exacted, but has not.

4th. The power of re-entry in the lease is not only different from that required by the leasing power, but much less beneficial to the reversioner. Under an absolute power of re-entry, the reversioner would be entitled to succeed in an ejectment, on proving the rent in arrear, a demand made, and the execution of the counterpart of the lease by the Defendant. Under a power to re-enter on failure of distress, it would be necessary for him to prove that he had searched every part of the premises demised,

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and that no distress was to be found *, a matter of extreme difficulty where the rent is small and the premises extensive. A conditional clause of re-entry, which may be an adequate remedy in the case of high rents and lands of small extent, becomes quite insufficient when the rent is small, as is usually the case with ancient rents, and the lands demised of considerable extent. And as the absolute power of re-entry becomes the more necessary for the lord, in case of small rents for large property, so it becomes the less inconvenient for the tenant, who might have some difficulty, and expect some indulgence to raise a large sum, but can have none in being ready with a small one. It is indeed universally true, that in order to secure a small demand, the remedy should be more summary and less expensive than is requisite to enforce a large one.

5th. The finding of the Jury, that the usual and accustomed form of leases of the estate contained in the marriage settlement was with a conditional proviso of re-entry, ought not to be taken into consideration in deciding this case. The words of the leasing power are "a power of re-entry for non-payment of the rent thereby to be reserved;" they contain no reference to the former practice of leasing the estate, nor is there any fact stated on the special verdict which raises any ambiguity in them; and a provision contained in a written instrument may not be explained or construed by any extrinsic matter, except in two cases; first, when the provision refers to extrinsic matter; secondly, when its terms contain a latent ambiguity, that is,

* *Rees v. King, Forrest. Exch. 19.*

when, in consequence of some matter of fact shown by evidence, it appears that the language of the instrument has more meanings than one, neither of which is the case with the clause in question.

6th. Even supposing the former practice on the estate might legally be taken into consideration, it is far from affording any inference favourable to the case in question. It is not found that the former leases were granted under similar powers. There is nothing to show that the creator of the power was not dissatisfied with the former clauses of re-entry, and did not insert the provision in question for the very purpose of introducing a new one, which might well be, for the reasons stated above. And this is the more probable, because the leasing power, in several instances, expressly refers to the former practice on the estate, where it was intended that the tenant for life should be guided by it; there is no such reference in the clause relating to powers of re-entry; the inference is, that the practice was not intended to prevail with respect to powers of re-entry.

For the Plaintiffs in Error, the *Attorney General* and *Mr. Puller*.

For the Defendants in Error, *Mr. Jervis* and *Mr. Maule**.

In the course of the argument the *Lord Chancellor* observed, that if the settlement had said there should be "a reasonable power of re-entry," some-

* The arguments and authorities cited are all noticed in the opinions delivered by the Judges and the Lords in moving judgment. The argument in detail is therefore omitted.

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body must have judged, in the first instance, what was reasonable in that respect ; and he added, that in his experience he had never seen a settlement which directed any thing as to the number of days allowed for rent to be left in arrear ; and that as to leases granted under powers in such settlements he had never seen any which did not contain some allowance of days.

After the argument, the *Lord Chancellor* proposed the following question for the opinion of the Judges :

Whether, having due regard to the true intent and meaning of the indenture of the 2d July 1757, according to the legal construction of the several parts of that indenture as stated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th September 1803, as the same is stated in the special verdict, is for any and what reasons invalid?

There being a difference of opinion, the twelve Judges, in answering this question, delivered their opinions *seriatim*.

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Richardson, J.—After having shortly stated the case, the proceedings, and the question put to the Judges, proceeded thus :

I am of opinion that the lease of 1803 is invalid, because I think it is not made in conformity with the leasing power contained in the indenture of 1757.

The leasing power for that class of leases, of which the lease in question is one, requires that "there be contained in every such lease a power of

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re-entry for non-payment of the rent thereby to reserved :” and the question resolves itself into —what is the true construction of these words?

In order to decide this, I must first consider, whether the words themselves import and convey a distinct meaning : and I think they do ; I think I mean, that the lessor should have power to re-enter if the rent reserved should not be paid according to the reservation.

One test, and, I think, a fair one, whether such meaning is conveyed by the words of this power, would be to insert in a lease a proviso for re-entry, expressed as nearly as possible in the very words of the power itself, and then to consider what construction a proviso so expressed would require, and whether the meaning would be sufficiently distinct to be capable of being enforced by a court of justice. Suppose, then, in the lease of 1803, it had been provided, that it should be lawful for the lessor or person entitled to the rent, “to re-enter for non-payment of the rent hereby reserved.” In that case would the person entitled to the rent have been empowered to re-enter if the rent had not been paid on the days of reservation ? It seems to me, that he would have been so empowered ; and *that* without any delay or condition other than the previous demand required by the common law : for all that he would be bound to prove, in order to justify his re-entry, would be, that there was non-payment on demand of the rent reserved by the lease.

If this be so, it seems to me to prove that the necessity of waiting fifteen days, and the necessity

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of proving a deficiency of distress on the premises imposed by the proviso actually contained in the lease of 1803, are conditions not warranted by the leasing power.

It has been said, that the leasing power requires only “*a* power of re-entry,” much stress having been laid on the indefinite effect of the article “*a* ;” and it has been further said, that, though such power of re-entry is to be “for non-payment of the rent,” yet, that the words “*for* non-payment” are not equivalent to “*on* non-payment,” but only point at the purpose or object of the power of re-entry, namely, that of securing the payment of the rent.

It appears to my mind, however, that, although the article “*a*” be indefinite, yet it cannot, in just construction, extend an indefinite meaning to the subsequent words, if they sufficiently import (as I think I have shown they do) a distinct and definite meaning. In this sentence, the word “*a*” seems to me neither to add to nor to qualify the meaning; but, that the meaning would have been the same, if that word had been wholly omitted, and the sentence had stood thus, “so as there be contained in every such lease power of re-entry for non-payment of the rent thereby to be reserved.” And, as to the observations made on the meaning of the words “for non-payment of the rent;” although it is true, that the word “*for*” does often import the purpose or object, (and so it might here, if the words had been “a power of re-entry *for* payment of the rent :”) yet the same word “for,” as often imports the cause or occasion of that which is predicated;

and such I think is its import here, where the words are "a power of re-entry for *non-payment* of the "rent," meaning on occasion of the *non-payment*.

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If the words of this leasing power import, as I conceive they do, by themselves, a distinct and definite meaning, I think it follows, that the fact stated in the special verdict respecting the usual and accustomed form of leases of the estate mentioned in the marriage settlement can have no legal effect on the construction to be put on these words. Such evidence, I conceive, is never admissible in the construction of a written instrument, unless the words of the instrument itself import a reference to something extrinsic, or unless the words involve some latent ambiguity, that is, an ambiguity not appearing on perusal of the instrument itself, but which becomes apparent on applying its provisions to the subject matter. The words of this leasing power, in that part which respects the clause of re-entry, seem to me to involve no latent ambiguity, nor to import any reference to any thing extrinsic; although some former parts of the same leasing power do import such reference, namely when it is required, that the lands to be leased for lives should be such lands as were in lease for lives at the time of making the settlement, and that the rents to be reserved should be the ancient rents, or rents as great and beneficial.

I admit that a court is bound to look at every part of a written instrument, in order to ascertain the meaning of the parties in a particular part. But I think it by no means follows, because this settle-

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ment, in respect of the rack-rent leases, expresses that the tenant is to be allowed twenty-eight days for payment, that therefore it was intended, in respect of the leases for lives, to give a similar or any allowance of time, which is not only not expressed, but which appears to me to be at variance with what is expressed.

Supposing, however, it were possible on this ground to get rid of the objection made against the lease of 1803, in respect of the allowance of fifteen days; another and still more decisive objection remains, namely, that this lease fetters and confines the power of re-entry to such cases only where there is a want of sufficient distress; a condition which appears to me, to be equally inconsistent with the power applicable to leases for rack-rent, and to that which is applicable to leases for lives.

The case of *Coxe v. Day**, which I think was rightly decided, appears to me to be in point, and I cannot draw any distinction which is satisfactory to my own mind from the circumstance that the leasing power *there* allowed a period of twenty-one days for payment; whereas the leasing power *now* under consideration as to the leases for lives, expresses no such allowance. It is true, that in *Coxe v. Day*, the case of *Hotley v. Scot*†, does not appear to have been cited; and it seems that in the last-mentioned case a similar objection taken to a lease granted under a power was over-ruled by the Court

* 13 East, 118.

† *Lofft*, 316. S. C. Mr. Butler's MS., see note (a), p. 331.

of King's Bench : on what ground* the Court proceeded we are not apprized, and being obliged now to make an election between the two authorities I must express my concurrence with that of *Coxe v. Day*.

It has been suggested, that the statute of 4 G. 2. c. 28, though professedly made for the benefit of landlords, does in effect take away their right of re-entry at common law, and confine them in all cases to the statutable remedy thereby given, which remedy can never be exercised without proof that no sufficient distress was to be found on the demised premises countervailing the arrears then due. And I think it must be admitted, that such a construction of the statute, if it be the true construction, furnishes a sufficient answer to the second objection made to the lease of 1803 ; for in that case the lease has only expressed that which, whether expressed in the lease or not, the statute law has provided.

But I cannot think that this is the true construction of the statute. The object of the statute, as appears to me, both from the recital and the enactments, was to relieve landlords from certain inconveniences to which they were subject by the law as it then stood, and to give them certain remedies to which they were not before entitled ; but not to deprive them of any remedies or rights to which they were already entitled by law. It contains no negative or prohibitory words, which I think would obviously have been inserted if the intention had been to deny to the landlord the future exercise of any ancient right ; and it would, as it strikes me, be

* See the arguments and judgment, *post*. p. 332, *et seq*.

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a strange construction to hold, that the words apparently intended for the landlord's benefit do, from their generality, operate to extinguish any of his ancient rights; when if such had been the intention it would have been so easy and so obvious to express it. That such however was not the intention; I think manifestly appears from this, that whenever the new mode of proceeding in ejectment given by the statute is pursued, the statute declares that "then and in every such case the lessor in ejectment shall recover judgment and execution in the same manner as if the rent in arrear had been legally demanded and a re-entry made." It refers to the legal demand and re-entry as a still subsisting mode of proceeding, not repealed or affected by the statute; and thereby shows that the old mode of proceeding was intended to be left as it was, although the new one, if adopted, is declared to be equivalent for the purpose of obtaining a valid judgment and execution. This, I believe, has always been considered as the intent and effect of the statute; and although I am not able to point out any case where it has been expressly decided that the statute does not take away the landlord's remedy at common law, several cases have occurred where landlords have so proceeded without objection on that ground, and it has been taken for granted that they were well entitled to do so. *Doe dem. Forster v. Wandlass** and *Roe dem. West v. Davis*†, are cases to this effect, and so is 1 *Wm. Saund.* 286. No. 16.

* 7 T. R. 117.

† 7 East, 363.

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It has been said, that if the lease of 1803 be invalidated the decision will shake many titles. I have no means of knowing whether this observation is well founded, or to what extent. If such should be the consequence I shall regret it; but I cannot feel that such an apprehension can afford a legitimate ground for deciding the present case, otherwise than as the words and legal effect of the instruments now under consideration seem to me to require. Upon the whole, therefore, I am bound, for the reasons before given, to answer the question in the affirmative.

Best, J.—The words of the power are, “and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved.” The terms in which it is expressed are general and indefinite. Instruments in such terms are not to be abstractedly and absolutely considered, but with reference to the nature of the subject to which they relate. They are in law taken to contain such qualifications as are manifestly just and reasonable, and such as according to practice, have before been introduced in similar cases, and which, not being expressly excluded, must be understood to be within the intent of the parties. This rule of construction is universal; it cannot be departed from without destroying the excellence of the law, which consists in its bearing a just relation to the state of things on which it is to operate. Thus, under contracts to sell goods, in which nothing is said as to the time of delivery, the vendor is not bound to deliver them the instant that the contract is made. Under a contract to perform

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a particular service the contractor is not bound to begin his work immediately. In both these cases the law allows a reasonable time for the performance of the contract. Under a contract for service for a year the law will not compel the servant to serve every hour of the year ; but excepts such a portion of time as is necessary for refreshment and relaxation. So, if there be an established usage, regulating the manner in which a thing contracted to be done, is to be done, as the time and circumstances of delivering articles sold, or the payment of the price, or the time for paying a bill of exchange. Such usage is by law incorporated into the contract without any words of reference to it.

Our books do not furnish many cases on this subject. There are enough, however, to satisfy us that according to the practice that has long prevailed among conveyancers, the proviso for re-entry in this lease is a sufficient execution of the power. The existence of this practice, and its being considered reasonable, account for there being no more decisions of courts on the subject. From the few cases that are to be found, the balance of authority seems to me to incline much in favour of the validity of this lease. But the authority of the cases in favour of the lease is much strengthened by the practice of that branch of the Profession of the law who have been accustomed to prepare powers, and leases under powers.

The first case is that of *Jones dem. Bromefield v. Verney* (a). Sir John Cowper had been enabled

(a) *Willes*, 169.

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by act of parliament to grant building leases for any term not exceeding sixty-one years, "so as in every such lease there be contained a condition of re-entry for non-payment of rent." The clauses of re-entry in the leases granted by Sir John were for non-payment of the rent *in forty-two days after the days of payment*. An ejectment was brought in the Common Pleas to turn a tenant out of possession who held under one of these leases; but no objection was made (although it was stated in the judgment that the case was fully argued) on the ground of the qualification introduced into the lease, by the words "forty-two days after the day of payment." This is but negative authority; but considering the great learning and industry employed in the discussion of this case, an objection must have been raised if the law had not been considered to be settled; and if it had not been thought that the lease was sanctioned by a practice which no argument could overturn.

The next case is *Hotley v. Scot* *. The words

MICHAELMAS TERM, 14th GEORGE III. B. R.

* This case is reported in *Lofft* 316, under the name of *Hotley v. Scott*.]

In a manuscript note taken by Mr. Butler (of which a copy is subjoined) it is given under the name of

LORD TANKERVILLE v. WINGFIELD and PRITCHARD,

Upon ejectment; the case was as follows. Upon the marriage of Sir John Astley, his lady's estate was settled upon Sir John for life, with several remainders over, which never took effect; remainder to the lady's right heirs. A power of leasing was given to Sir John, such leases to be made for any number of

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of the power were, that if the rent should be behind or unpaid for twenty-one days the lessor should have

years, at the accustomed rent, to take effect immediately in possession, and not by way of future or reversionary interest; and on every such lease there was to be inserted a clause of re-entry if the rent should be behind for twenty-one days; the rent to be made payable, and the re-entry to be incident to and go along with the reversion or remainder. In the same settlement there was also a power of revoking all the uses thereby declared, and appointing new.

Some time after the marriage, Sir John Astley and his lady revoked all the uses of the settlement that were subsequent to Sir John's life-estate, and the powers incident thereto, and declared new uses. There was also a fine levied to the same effect.

September 21, 1766, Sir John made two several leases of the date to the two defendants, Wingfield and Pritchard, for twenty-one years, conformable to the power he had by the said settlement, and the other deeds and the fine, except that previous to the entry distress was to be made, and it was nearly in the following words: "That if the rent should be behind or unpaid by the space of twenty-one days, and no sufficient distress or distresses could be had, or if the lessee should assign over the leased premises, (except as therein is excepted) then it should be lawful to Sir John Astley, his heirs and assigns, to enter."

Sir John Astley and his lady being both deceased, the estate are descended upon Lord Tankerville, the Plaintiff, &c.

Dunning, for the Plaintiff:—The Court always takes a difference between powers when exercised by a man upon his own estate, and the exercise of powers by a man upon another's estate, or which he holds in another's right. The first are at

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power to re-enter. The condition in the lease was, if the rent should be behind and unpaid for twenty-

Tankerville, has, substantially, all the powers he ought to have, or can have. As to the first objection, the rent cannot be made payable but to those in remainder or reversion, to which it is inseparably incident. The heirs and assigns of Sir John Astley mean those who are heirs and assigns to the estate under the settlement by which Sir John claims the estate. See *Cotter v. Merrick* *. Tenant in tail died seised, his son entered, and made a lease for twenty-one years, rendering rent during the term to the lessor, his heirs and assigns, and died.

It was unanimously adjudged to be a good lease, and within the 32 H. 8.; the opinion of the Court being, that the word heirs being a comprehensive word, it ought to be construed *secundum subjectam materiam*, and to have that construction which the nature of the deed requires. This is much the stronger in the present case, as Sir John Astley having joined with his wife in the deeds which raised the limitations, those who take by virtue of those limitations may, in some respect, be said to be the heirs and assigns of Sir John Astley. As to the second objection, that the re-entry, which is directed by the power in the settlement to be reserved immediately on the rent being behind twenty-one days after it is due, is by the lease to be preceded by distress and by demand. The words in the settlement are short and loose, and seem to be no more than a general direction that in every lease to be made under this power there should be a clause of re-entry. It is not a formal description what kind of re-entry should be reserved, or of any particular clause of re-entry; it is a direction that the power of re-entry, usually inserted in leases, should be inserted in the leases to be made under this power in the usual manner. This, I apprehend, is a sufficient answer to the objections raised against these leases; each is a verbal objection, and I have given each a verbal answer.

Mr. Dunning, in reply:—The distinction I set out with, and the consequence of that distinction, that these leases are to be considered in a strict light, is not denied. And besides this claim to the favour of the Court, Lord Tankerville has that of being the heir at law of the owner of the estate on which this power has been exercised. Lord Tankerville is neither the heir nor the assignee of Sir John Astley; he claims by a title paramount to Sir John's. The rent is directed by the settlement to be incident to the inheritance, that is to say, to be to the several

* *Hard. 89.*

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one days, *and no sufficient distress could be*
then it should be lawful for the lessor to re-e

limitees of the settlement when respectively in poss
The reservation is to the heirs and assigns of Sir John
They are not limitees. This is therefore not a proper
tion of the power. The case quoted, and the act of parlia
only show that if a tenant in tail make a lease according
statute, and reserves rent to himself and his heirs, the
“heirs and assigns” may be construed to be such heirs
succeed by force of the entail. This construction can ne
the present case take in Lord Tankerville, who cannot,
sense or meaning whatever, be deemed the heir of Sir
Astley or his assign. It is sufficient to say, that in pleadi
could never be described as such. As to the words being
and directing what should be done, and not describing *to*
to be done, this seems a frivolous distinction. The settl
directs a clause of re-entry to be inserted in the lease; the
says it shall not be lawful for Sir John Astley to enter a
as there is a sufficient distress or distresses to be taken. Ti
it is postponed. This is contrary to the words of the settl
and is not, certainly, a proper execution of the power.

Lord Mansfield.—The two objections to these leases ar
That by the settlement the re-entry is to be made incid
the rent; but by the lease it is reserved to Sir John Astl
heirs and assigns. And in the event it has not follow
rent, but gone to the heirs of the lessor, Sir John Astley,
Lord Tankerville is in the lawful possession and receipt
rents. The second objection is that the clause of re-entry,
by the settlement ought to be immediate, is by the lease fe
being on a previous demand† and previous distress. As
first, by the nature of the power it must go with the reversi
inheritance. The person who is in the reversion and inher
is he that is to enter on the forfeiture of the lease, and no o
enter but he to whom the rent is payable; for as Littleto
no stranger can enter for forfeiture, for a stranger cannot
by his former estate. If the rent had been reserved for the
as in the case cited from Hardres, still it goes with the i
ance. Heirs and assigns can only mean those who hav
reversion and inheritance; otherwise, as is said, 2 Sa
they would be words of surplusage. The clause of re-entry
go with the inheritance the same as the rent, for it can
reserved to any body but to him who is seised of the inheri
It was said, that it ought to have been worded, to the perso

• 32 Hen. 8.

† This does not appear by the clause as set forth, *ante* p. 332.

‡ 370.

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Lord *Mansfield* in giving judgment, said, "The clause of re-entry is short with words of course, and does not preclude the operation of law—a re-entry is to enforce the payment of rent—by statute it cannot be without distress." The report of this decision is very short. It is probable that it does not give us the very words of Lord *Mansfield*, but we learn with certainty from it that the Court decided the very point now before your Lordships in favour of the lease: for the power does not contain a syllable about a sufficient distress; this qualification is introduced into the proviso for re-entry, and yet the Court upheld the lease. It is clear, also, that Lord *Mansfield* must have referred to some form of drawing up these powers and clauses of re-entry which were then in use, and have expressed himself, that the power and clause in that case were agreeable to usual form. He is made to say, "The clause of re-entry is short with words of course." It is most probable that he said the *power* was short with words of course; the obvious meaning of which is, that the power was expressed in the terms commonly used in such cases, and imported that sort of clause of re-entry which it was then the practice to introduce into leases made under powers; that the only object of the power being to secure the payment

in the reversion or remainder. The words heirs and assigns are general words, and are as good as and quite tantamount to particular words. As to the second, the clause of re-entry is short with words of course, and does not preclude the operation of law. A re-entry is to enforce the payment of rent; it is an immediate forfeiture of the estate by common law. By statute it cannot be without a want of distress. Therefore in both points we agree to support the leases. So the verdict must be entered for the Defendants.

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of the rent reserved, such qualifications as the law considered reasonable and consistent with this object were not excluded :—as the Legislature had thought the landlord ought not to have any greater facility for recovering possession of the estate than he had at the common law, when there was a sufficient distress on the demised premises, the introduction of such a condition into the clause of re-entry was but a reasonable qualification. This decision is an authority to show that reasonable qualifications may be introduced into clauses of re-entry when the terms of the power are general ; and also, that the qualification most objected to in this lease is reasonable.

That a power expressed in general terms is well executed by a lease containing a proviso with legal qualifications, is further proved by *Dormer's case**. “ By special consent of the parties a re-entry may be for default of payment of rent without demand of it. And divers other cases were put where the consent of the parties shall alter the form and course of the law.” Although a clause of re-entry was absolute for nonpayment of rent, yet the common law superadded the qualification to that clause, that the rent be demanded on the estate demised on the last hour of the day when it was payable ; and according to *Dormer's case*, the demand of the rent can only be dispensed with by special consent, or, (as it is expressed in *Newdigate's case* †,) “ that it shall be lawful without *further demand* to re-enter.”

If at common law a landlord could not recover possession against a tenant holding under a lease,

* 5 Co. 40. b.

† *Dyer*, 68.

containing a general clause of re-entry for non-payment of the rent without a demand of the rent, surely, when the Legislature has relieved the landlord from making a demand of the rent, and substituted in the place of that demand the condition, that there be not a sufficient distress on the premises, the law will not allow the tenant to lose his estate if there be a sufficient distress on it to satisfy the rent due. It will require the same express consent to exclude the condition of there being no sufficient distress since the statute of *George the 2d.*, as was required to exclude the necessity of a demand of the rent at common law.

I do not mean to say that since the statute of *George the 2d.* a man may not proceed at common law. My argument is, that the law annexed the condition of demand of rent before the statute, and as the statute has now dispensed with a demand of the rent when there is not a sufficient distress, the law will annex the condition of there not being a sufficient distress to a power expressed in general terms; and therefore a clause of re-entry containing this condition is not inconsistent with such a power; otherwise the tenant would not have the protection which according to the spirit of the law he ought to have; for by an omission to pay the nominal rent on the day it became due, he might, without notice, and with abundance of property on the land to satisfy the rent, be dispossessed of an estate for which he had paid a large rent in advance under the name of a fine. This would be making that remedy which was intended only as a security for the rent a forfeit-trap.

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The decision in the court of King's Bench in *Core v. Day* is supposed to establish a contrary doctrine. Lord *Ellenborough*, during the argument of that case, seems to have intimated an opinion inconsistent with that which I have offered to your Lordships. But it is not dealing fairly with that great Judge to hold him to what he threw out whilst he was forming his opinion, particularly when it is contrary to what he afterwards decided, when the case now before your Lordships was in the King's Bench. The wisest of men could not escape the charge of inconsistency, if expressions, which are dropped while the mind is struggling with the different considerations presented by conflicting arguments, are to be recorded. I know not on what ground the Court agreed to the certificate which was sent to the Court of Chancery: but I cannot admit that this certificate is an express authority on the point now under consideration, when the case presents a ground, on which, with the opinion that I entertain on this case, I should have signed that certificate. The power in *Core v. Day* was in these words, "so as in every such lease there be contained a condition of re-entry for the nonpayment of the rent reserved by the space of twenty-one days." The words of the proviso were, "if the rent should be in arrear for twenty days—*being lawfully demanded.*" The words "*being lawfully demanded*" weakened the landlord's security for his rent by imposing on him the necessity of demanding it on the last hour of the day on which it became due, a thing always found to be attended with difficulty, and often impracticable, and from

which landlords are relieved by the statute of *George the Second*. Such a proviso could not be sufficient under such a power.

If authority be doubtful we must recur to principle. When property in lands is divided into states for life and estates in remainder, it becomes an object to secure to the possessor all the advantages which belong to his estate. The mode of doing this is by giving to the tenant for life a power to grant leases for certain terms not determinable with his life. Unless he has this power the estate will not be cultivated as it ought to be; much less will it be improved: and not only tenants for life but the public would suffer from the want of such powers. In the granting these powers care must be taken that in granting their leases tenants for life do not prejudice the estate of the remainderman: possession of the lands must be secured to the tenant, and the rent to the landlord. Considering this as being the object of these powers, Judges in the construction of them will only have to consider—What did the maker of the power consider sufficient to attain this object? Can any one doubt that the maker of this power would have considered the clause of re-entry in this lease abundantly sufficient to secure the rent? But for the respect which I feel for those learned Judges from whom I differ on this subject, I should have said, without doubt or hesitation, “a clause of re-entry” means in law what these words would in common conversation, viz. such a clause of re-entry as is generally inserted in leases. That this clause answers that description will not, I think, be disputed.

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That the principle on which I found my opinion is a sound legal principle is evident from the following cases: In *Hotley v. Scot*, Lord Mansfield says, "a re-entry is to enforce the payment of rent." In *Wadman v. Calcraft**, Sir William Grant says, "there is no doubt equity will relieve against the forfeiture; considering the purpose of the clause of re-entry to be only to secure the payment of rent; and that when the rent is paid the end is obtained." In *Opey v. Thomasius and others*†, Twisden, J. says, "powers are to be expressed according to the intent of the parties." In *Goettliche v. Funucan*‡, Lord Mansfield says, "powers are now a common modification of property in land, and as such are to be carried into effect according to the intention of those who create them."

I shall not advert to some facts which are found by this special verdict, and on which arguments might be offered in favour of this particular case. My opinion is formed on these general grounds: Where the power is expressed in general terms, as it is in this case, reasonable qualifications are not excluded, but are to be introduced into the power.

believe that it has been so much the general practice of conveyancers to insert such clauses, that if our Lordships were to declare this lease invalid you would destroy the titles of a very large proportion of the landholders in the kingdom. Much of the property in the *West* is held by leases granted to tenants for life: I know that in other parts of *England* actions are already brought to turn tenants out of possession of those estates on the same objections as are made to this lease. Some of these actions have been brought to trial before me, and now await the judgment in this case.

I have heard the learned Judges say that they could never allow a practice to be set aside on which the titles to many estates depended, however much they might disapprove of such a practice. If you set aside this lease you will turn a large proportion of the tenantry of England out of estates for which they or their ancestors have paid large sums of money, and which have been continued in their families by a successive renewal of leases for as great a length of time as any of your Lordships families have held their estates. The personal property of tenants for life, the fund out of which provision is to be made for the younger branches of families, will be drained and no compensation to the leaseholder for the loss that he has sustained by being deprived of his lease; and where these funds fail the families of the leaseholders will be ruined.

I have only further to say, that I see no reason to hold the lease stated in the special verdict invalid.

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his wife, of the 2d July 1757, on which this question arises, gives a power of leasing, requiring, with respect to property of the nature in question, there shall be contained in the lease a power of re-entry for non-payment of rent. In this lease no time is specified, by way of indulgence to the tenant, as to the payment after the day on which it shall fall due, nor are any other terms required than that the person who from time to time shall be in possession of the estate shall insert in the lease a power to resume the possession for non-payment of the rent.

The lease granted by Lord Vernon to the defendant and another, contains a clause for re-entry if the rent shall be in arrear for the term of fifteen days, and if there shall be no sufficient distress on the premises to satisfy the rent; and the question is whether this is a good execution of the power, or in other words, whether this is such a power of re-entry as was required by the creator of the settlement.

It is observable, that the creator of the power, and those who advised her, knew how to make distinctions as to powers of re-entry applicable to different

be a right to enter at the expiration of these twenty-eight days.

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In the case of the render of 2*l.* a year, and a couple of fat capons, or 18*d.* at the option of the lessor, it is insisted that the power of re-entry should be altogether absolute and unconditional; and that at the first moment when the day has expired on which the money is demandable, the power of re-entry is to attach, and enable the reversioner at that moment to turn the person out, who upon a valuable lease for years determinable upon lives should have permitted the day to expire before he had paid his sum of 2*l.* I admit that if the maker of the settlement had in express terms said, "the power shall be to re-enter the moment at which the rent is due, and not paid or tendered," a court of law could not alter, but must execute such power as expressed. We must see whether the power has been complied with or not.

Now the terms of the condition in the settlement are, that there shall be contained in the leases a power of re-entry on non-payment of the rent. Is there not in the lease granted to the defendant a power of re-entry on non-payment of the rent? There is; but it has been urged with great force that it is not such a compliance with the power as the reversioner had a right to expect the lessor should have made; for he has clogged the clause of re-entry with a delay of fifteen days, and with the necessity of seeing that there is no sufficient distress upon the premises. The answer to this appears to me to be, that according to our experience such an event is so improbable, that it probably did not occur to

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questions submitted to us we must consider that we are required to give our opinion on the construction of a deed. There are certain rules of the common law which must govern us on such an occasion. One rule is, that the construction must be made on the whole deed. The principle of the common law is, that *Ex antecedentibus et consequentibus est optima interpretatio* (a). There is another rule which also strongly applies to the case in question, and that is, *Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est*. Acting on these rules, I contend that there is no ambiguity in the words of the power, and that it is manifest, from the various parts of the deed of the 2d July 1757, that it was the intention of the parties to have these words understood as they are written, and without addition.

The clause of re-entry in the demise ought, I contend, to have corresponded with the *reddendum*, which is to this effect, “yielding and paying the yearly rent of 2*l.* at *Michaelmas* and *Lady-day*, by equal portions;” and not so corresponding I am of opinion the lease is invalid. First, because there can be no re-entry unless the rent is behind and unpaid for fifteen days from *Michaelmas* and *Lady-day*, which is an extension of the time beyond that in the *reddendum*. Secondly, because the re-entry for the non-payment of the rent cannot, by the express terms of the demise, be made if there is sufficient distress to be had on the premises. The general scope of the deed is too well known to require repetition. It has heretofore been considered

(a) Shep. Touch. c. 5, rule 4, fo. 87.

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that there are three distinct powers in this deed. I conceive that, correctly speaking, there is only ~~one~~ power, consisting of three distinct parts. I say ~~this~~, because the enabling words "that it shall and ~~may~~ be lawful, &c." are placed at the head of the whole, and are not afterwards repeated; and the other parts are introduced by the words "and also." It appears to me, from this mode of looking at the deed, that it may be fairly collected that the framers of it must have had their minds directed to the different *parts* of the power; and must have designedly and deliberately introduced an additional restriction ~~on~~ that part of the power which relates to leases for years, and references in other parts to extrinsic matters, and designedly and deliberately omitted ~~any~~ such additional restriction in the part of the power in question, and also all words of reference to ~~ex-~~trinsic matter or former leases.

The first part of the power is that which relates immediately to the demise in question; by this Mr. Vernon and his wife (who by the deed took successive estates for life) are enabled to grant leases for life, or years determinable on the death of a life ~~or~~ lives, of such lands as at the time of the deed were leased for life, or years determinable on the dropping of a life or lives; so as the ancient and accustomed yearly rents, dues, and services, or more or as great and beneficial rents, &c. be reserved or made payable, and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved. Now, what is the rent thereby to be reserved but the *reddendum*?—the power of re-entry is to be for the non-payment of

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that rent. If that rent was not paid at Michaelmas-
lay or Lady-day, I contend that it is plain by the
very terms of the deed that the right of re-entry
ought to be complete.

It is not to be doubted that former leases were
admissible in evidence for two purposes: first, to
show what lands were, at the time of the demise,
leased for life or years, as described in the deed;
secondly, to show what the ancient and accustomed
rents were; for former leases are for these pur-
poses necessarily referred to. But, it appears to me
to be free from doubt that, as to the power of re-
entry prescribed by the deed, there is no reference
to former leases or to prior circumstances, but to
the *reddendum* only, ascertaining not only the rent
itself, but also the mode and time of payment. This
power of re-entry prescribed by the deed is framed
in plain terms; it contains a clear proposition in it-
self, and therefore I contend, that the maxim that
*quoties in verbis nulla est ambiguitas, ibi nulla ex-
positio contra verba fienda est*, is precisely appli-
cable to the point. Thus to decide is to avoid
the vicious mode of interpretation which is repro-
bated by a maxim to be found in Lord Bacon's
Tracts (b). *Divinatio, non interpretatio est quæ
omnino recedit a literâ*. If you stir beyond what
the deed expressly prescribes then commences the
divinatio, and the *interpretatio* is at an end.

Next follows in the deed what, I say, is more
properly a second part of the same power than a
distinct and separate power. The general enabling
words being at the beginning of the whole; this part

(b) 67.

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to this deed intentionally omitted an extension of the time of payment in the first part of the power under which the demise in question is contended to be valid; and that they intentionally inserted the extension of twenty-eight days in the second part: and I confess I feel myself alarmed at the fate of men's deeds, if it shall be holden that the demise in question is valid which contains an extension of the time of payment to fifteen additional days, not hinted at in the power itself, and inconsistent with the *reddendum*; and which also contains a provision which deprives the reversioner of his re-entry if on any part of the premises there may chance to be sufficient distress. That the clause of distress imposes a difficulty on the reversioner is proved by the case of *Rees on dem. Powell v. King and Morris*, tried before Mr. Justice *Heath* in the summer of 1800, at *Hereford*, whose opinion was ratified by the opinion of the Judges of the Court of Exchequer in the following term. It was there held, that a clause of forfeiture in a lease, in case no sufficient distress was to be found on the premises, must be pursued strictly, and every part of the premises must be searched.

The third part of the power is introduced in the same manner as the second part: this is the part which empowers the leasing mines then open, or lands wherein persons may be willing to open mines. Annexed to this there are several restrictions running in this language: "So as in every such lease there be reserved or made payable such parts of the lead, copper ore, coal, and other produce to be gotten from the said mines, or such other yearly rent or

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income in respect thereof, as can be reasonably had or gotten for the same, without taking any fine, &c., and so as the lessees execute counterparts; and as there be inserted such proper and usual covenants for the effectually working the mines, &c., and doing all proper and necessary acts as are usually inserted in leases of the like nature. It is to be observed, that with respect to these leases there are special restrictions peculiarly applicable to them. The parties to the deed had all the parts of this power before them, and have cautiously introduced restrictions applicable to each part: and can a court of law add to these restrictions? The rents of the mines, or the parts of the produce to be reserved, are to be such as can be reasonably gotten; the covenants are to be the usual covenants for effectually working them and doing all necessary acts.

In the second and third parts the word "reasonably" is introduced; but it is wholly omitted in the first part. Is a court of law authorized to transplant the word "reasonable" to the first part, when the parties have introduced it in the second and third parts, and omitted it in the first part? This cannot

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I have formed. I cannot accommodate my opinion to the convenience of lessees under powers; their estates must stand or fall by the authority under which they are made. It is a maxim of our law, that it is better to suffer a mischief than an inconvenience: the mischief (if it be any) we can see the extent of; it will be, that certain demises, in consequence of the carelessness or ignorance of those who drew them, will be invalid, and they who were intended to take, in the event of there being no good subsisting leases, will take. On the other hand, no one can foresee the end of inconveniences which would arise from the relaxation of the rules of law in the construction of these deeds.

As to the cases of *Hotley v. Scot*, and *Coxe v. Day*, from the report of the first case I cannot discover what was decided, it is to me unintelligible; but supposing it to be applicable, we have the later case of *Coxe v. Day*. The decision of the four learned men on the second question has great weight with me, and I cannot see why it ought not to guide our judgment on the present occasion. It is well known that the late learned Lord Chief Justice of the Common Pleas, Sir Vicary Gibbs, thought that decision right, and was of opinion that the present lease was invalid: he was in office when the present case found its way into the Exchequer Chamber.

Holroyd J.:—I think that, having due regard to the true intent and meaning of the indenture of the 2d day of July, 1757, according to the legal construction of the several parts of that indenture, as

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tated in the special verdict, and having also due regard to the legal effect of all the facts and circumstances found by the special verdict, the demise of the 5th of September, 1803, as the same is stated in the special verdict, is invalid.

By the death of Lord Vernon, the lessor, who had an estate in him for life only, that demise became invalid, unless it were made in conformity to one of the powers of leasing contained in the above-mentioned indenture of the 2d of July, 1757. That indenture contains three powers of leasing; one, for a life or lives, or for a term determinable on a life or lives; another, for years not exceeding twenty-one; and the third, for working mines or ore for years not exceeding thirty-one. Each of these powers is clogged with qualifications of two descriptions; one class of which is comparative, or with reference either to the existing or previous state of things, or to usage or custom, or to what can reasonably be had or obtained; the other class is direct and absolute, without any reference or regard either to the existing or previous state of things, or to usage or custom, or to what can be reasonably had or obtained, or to any matter whatever; these last qualifications are superadded by the creatrix of the power, to be complied with at all events, as I think, without reference or regard to any matter, and not to be varied, changed, or altered by, or at all to depend upon, any usage, custom, or state of things, or any matter whatever.

The first of the above powers of leasing is that upon which the present question depends, the power of leasing for a life or lives, or for years determinable

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upon a life or lives. The qualifications with which that power is clogged, are, as to the reservation of the rents, duties, and services, that they be such as were the ancient and accustomed, or more or as great or beneficial as at the time of the demising were payable, or as much as a just proportion thereof amounts to, according to the value of the premises demised, or more, with the exception of heriots. These qualifications are comparative, or with reference, expressly, to the things there expressed ; and must be such as, on such comparison or reference, shall be found conformable thereto, and are wholly dependent thereupon. But the other class of qualifications superadded to this power is direct and absolute, and without reference to and wholly independent, as it seems to me, upon any other matter except what the law requires, and to be complied with at all events, whatever may be or may have been any usage, custom, or state of things whatever.— These other qualifications are, that the rents, duties, and services be incident to and go along with the reversion and remainder ; that the leases contain a power of re-entry for non-payment of the rent reserved, and not contain any express clause freeing the lessees from impeachment of waste, and that the lessees seal and deliver a counterpart of the lease. It is upon one of these direct, absolute, and independent qualifications of that power that the present question has arisen. That qualification is in the following words : “ So as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved.” This qualification being expressed in words that are direct

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nd absolute, and without reference to any former leases, or to any prior or then existing state of things, or former management or disposition of the property, the fact found by the jury, with respect to the former leases, cannot, I think, vary the legal construction to be given to this qualification. There is in the words no latent ambiguity which those former leases either raise or remove. If the words are not clear and explicit in themselves, their ambiguity, if any, is upon the face of the deed itself, and they cannot, I think, by law be allowed to crave in aid any former usage to vary or alter their construction ; and this more especially in the case of such a deed as the present, wherein the parties expressly direct, that a reference to the then existing or former usages should be had recourse to, where they intend that either of them should be called in aid on the subject matter of these qualifications. Besides, it has been held by the Court of King's Bench, in *Tiggulden v. May* (d), as well as by the Lord Chancellor in the same case (e), ratifying a similar doctrine that had before been held by Lord Alvanley and Sir William Grant, when Masters of the Rolls, in covenants for renewal of leases, that the construction of deeds cannot be varied by the acts of the parties ; and therefore, various other leases, that had before been successively made by the owners of the inheritances for the time being, could not be taken in aid to construe the meaning of a covenant for renewal. The instability and uncertainty introduced into rights of property created by deed, by

(d) 7 East, 237.

(e) 9 Ves. jun. 329.

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letting in such extrinsic evidence, and the mischief arising therefrom, would apply equally, as it seems to me, to the present case.

The present question arises in a case where the exercise of the power is by a person (namely, Lord Vernon) who, previous to the creation of the power, was a stranger to the estate ; and in a case, where this qualification of the power given to him by his wife must be taken to have been inserted as well for the benefit of herself, as of the several other persons in remainder, in derogation of whose rights his exercise of the power would operate so long as the lease should continue valid after the extinction of his life-estate. It would operate in derogation of her and their rights, by depriving them, successively, of the actual occupation and enjoyment of the demised premises themselves, which they would otherwise be entitled to have, and giving them, successively, in lieu thereof, a rent or rents such as the power required, however inadequate the same might be.

The power given to the tenant for life to lease for a term that may last beyond his own life, is agreeable to what is said by Lord Ellenborough in *Coxe v. Day* (f), for the benefit of the tenant for life ; the qualifications only, as he there also says, are for the benefit of those in remainder : and, in this case, those in remainder, who are to be protected by these qualifications (except the creatrix of the power herself), are not parties or privies, but are strangers to the deed ; and therefore as to them,

(f) 13 East, 127.

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words of the deed are to have their full operation in their protection against the tenant for life, who executed the power, and against whose act, which would or might be to their detriment, they were to be protected by this qualification. The very intent of describing these requisites is to protect the several remainder-men from the discretion of the tenant for life in the exercise of this power of leasing given to him. The object of the qualification is to secure to them the rent itself, and not to give them any substitute whatever in lieu thereof, other than and except the land itself for which the rent was to be paid. For this purpose this qualification looks to and specifies some occasion or event, and that a simple unqualified one, namely, the nonpayment of it, not under any particular circumstances only, but generally whenever there is a nonpayment of it, that is to say, it looks to and specifies the default of the lessees by the nonpayment of the rent the occasion or event on which those entitled to the rent to be paid for the land shall, for want of the rent, have the land itself, the *quid pro quo* the it was to be paid. Whenever that event or default makes the case then exists, I think, on which the land was to be had for that default, without any other matter being to be superadded thereupon, except what the general rules of law, independently of particular terms of contract, would require, such as those requiring in a particular manner and form demand of the rent due.

The words applying to the power of re-entry required to be contained in the lease are "a power of re-entry for nonpayment of the rent thereby

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“to be reserved;” that is, as I think, such a power as will authorize the party, whenever there is a non-payment of the reserved rent, to re-enter. That is the express cause on account of which he is to be at liberty to re-enter, which liberty must, I think, be co-extensive and co-existent with that cause; and that cause, which is nonpayment of rent, (such I mean as will authorize a re-entry) exists from the very instant that there is such a default of payment as the law requires to authorize a re-entry; and that default of payment equally exists from the moment of such a demand as the law requires being made of the rent due and nonpayment thereon, without any subsequent definite period of time having elapsed; and whether there be or be not distrainable goods on the premises sufficient to pay the arrears of the rent, and by the sale of which the remainder-man may, *at his own trouble and risk*, pay himself those arrears. The words “for nonpayment,” must in this case, I think, be taken to mean the same as either, “because of”—“by reason of”—“on account of,” or “in case of nonpayment;” that is to say, when that event occurs, and the same therefore as if the words were *on nonpayment of rent*. That appears to me to be the proper sense and meaning of the words; and it is also, as I think, agreeable to the object of the qualification, which is, that the party shall have the land whenever the lessee fails to pay the rent for it. The lessee’s failure or default in the performance of a duty which it is incumbent on him to perform, is the sole ground and consideration for entitling the party to re-enter and have again the land, without regard to

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possibility or power which the rent-owner may
e to obtain the rent by any other means or
rtions of his own.

But it has been argued that this qualification in
airing a power of re-entry is silent as to the time
n it should be carried into effect; and therefore
; it may be considered to require only that there
uld be some reasonable power of re-entry for
payment of the rent, and that the power of re-
y reserved upon the lease in question is a
onable power of re-entry for nonpayment of the
; and therefore as much as the creatrix of the
er has required. To this, besides observing that
word "reasonable" is not here used in the deed,
gh it is used in two other instances in giving
e powers where a discretion was intended to be
n, I answer, that this qualification in my opinion
ot to be so considered, if upon the due and
per construction of this leasing power, this
ing power, if fully executed, would have autho-
d a re-entry for nonpayment of rent in any case
which such entry would not be authorized for
payment of rent upon the lease in question.
I say that there are cases in which, if the
er of leasing had been fully executed, a re-entry
ht lawfully be made for the nonpayment of rent, in
ph it could not lawfully be made under this lease.
o try whether this be so or not, suppose the
t of re-entry reserved by this lease, instead of
being in its present form, had used the very
ds of qualification used in the deed creating the
er of leasing. Suppose the lease had been,
rovided that it shall be lawful for the lessors, &c.

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specific remedy in lieu of his rent in those cases, under the lease in question, which he would have under it on such a due execution of the leasing power as I have above supposed; but a different one, such as in some of such cases at least some contentious persons would not resort to or enforce, as enforcing the power of distress upon the heads of innocent third persons. The construction of the words in question, therefore, if used in a lease instead of being used in the leasing power, taken according to the proper and ordinary sense and meaning of the words used, would, as it appears to me, have given a right of re-entry immediately on nonpayment of the rent. They cannot, therefore, properly be deemed to have a different import and signification when used in the leasing power, from what they would have in a lease made conformably to that power, or that they would have if they were used in any lease whatever. There is only no right of re-entry given for nonpayment of the rent until a default of payment for fifteen days, but even on such default the right given by the proviso is not a right of re-entry to possess or enjoy the land, but a right only of distress in case there be a sufficient distress upon the premises. In the forms of leases contained in Horseman's Conveyancing, in the edition that I have, I have been unable to find only one that is clogged with the inefficiency of distress, all the others appear to be without it. Those leases appear to have been begun in the times of the statutes of William and Mary Geo. 2, and several of the conveyances there for granting annuities give, first a power of distress, in

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case the annuity be in arrear for a given number of days, and a right of entry and enjoyment till satisfaction, in case it be in arrear for a larger number of days, without regard to whether there be or be not any sufficient distress upon the premises. I think too that it affords an argument in favour of the above construction, and that nothing else can legally be deemed to have been in the contemplation or intention of the creatrix of the leasing power when she used the words in question, than a mere simple nonpayment, or default of payment of rent *generally*, unaccompanied with any other fact or circumstance, except that which the general rule of law requires viz. a demand. It is manifest, that where she meant any other fact or circumstance should accompany that nonpayment before the right of re-entry should be given, she has expressly mentioned it, for in the second leasing power she enables leases to be granted, though the right of re-entry be not reserved except upon a lapse of nonpayment for twenty-eight days after the time appointed for payment of the rent. And I do not see how the lease in question can be held to be valid except upon principles of law that would have rendered it also valid, in case the creatrix of the leasing powers had also expressly added in the second leasing power another ingredient besides that lapse of twenty-eight days, namely, the want of a sufficient distress upon the premises, without both which, in addition to the mere nonpayment of rent, a right of re-entry need not, in that case, have been reserved under the second leasing power.

But, in truth, the reserved right of re-entry which

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is now in question (whether it is to be deemed reasonable or unreasonable) is not a right of re-entry for nonpayment of rent, but it is in truth a right of re-entry for a different thing which may never exist, notwithstanding there is a default of payment of rent, namely, for an aggregate, consisting in part indeed of that default, but of two other things besides, namely, a certain lapse of time and a want of sufficient distress. It is, in reality, not a right of re-entry for nonpayment of rent, but a right of re-entry for want of a sufficient distress in case of such nonpayment. Instead of giving a right of re-entry for nonpayment of rent it refers the remainder-man to the right of distress on that event, a right which he would have by the general law, even without such reference; and it gives him the right of re-entry only at a later time for a different thing, and on a further event, viz. the want of sufficient distress.

It is not, therefore, in reality a right of re-entry for the same thing as the creatrix of the leasing power required it should be for (and which right, as I have said before, must I think be co-extensive with the existence of the thing, or event, or default for which it was given); but it is a right of re-entry for a combination of things, all of which must exist before the right of re-entry can be exercised. And now reasonable soever it may be thought that this qualification of this leasing power might have been given by its creatrix for the securing of the rent instead of the qualification she has actually given to it, it cannot I think be substituted for the qualification which she has actually given and required.

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But it has been argued that all this is immaterial, because of the general clause of re-entry that follows for default of the performance of any of the reservations, covenants, &c. But it is so completely settled, both on the maxims and authorities of law, that the general clause of re-entry can extend only to cases not before specially provided for, more especially when it would otherwise contradict and defeat the prior express provision, that I shall say no more upon this point.

But then it has further been objected that this leasing power being given and executed since the statute 4 Geo. II.,* the insertion of the want of a sufficient distress on the demised premises in the leases, in order to give the right of re-entry, has become immaterial; because it has been urged, that since that statute no right of re-entry for nonpayment of rent can be rendered effectual so as to regain the actual possession, unless where there is no sufficient distress to be found on the demised premises countervailing the arrears of rent due. But that statute does not appear to make any difference in the present case. That statute applies only to cases where the landlord has omitted to make such a demand of the rent as would entitle him to the forfeiture, and substitutes for his relief other things to be done in lieu, and then gives him the benefit of a forfeiture (to which he would not be otherwise entitled), and gives him that benefit only in certain cases, amongst which is the want of a sufficient distress, and on certain terms. But notwithstanding

* c. 28, s. 2.

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at statute, where a due demand of the rent has been made, a right of re-entry may be given, and may be effectually enforced, though a sufficient distress be upon the demised premises. That statute only applies only to cases where a half year's rent is in arrear, and not to cases where a less arrear of rent is due, as may be on the lease in question by a covenant, although the rent is reserved not quarterly but half-yearly.

But it has been further urged, that not only the above statute of the 4th Geo. II., but also the cases both at law and in equity show that the object of a power of re-entry is only to secure the payment of the rent. It was then contended, that this payment of the rent is as effectually and as beneficially secured by the power of re-entry actually reserved in the present case, as if that power had been reserved in the words used in the leasing power, inasmuch as it is that it reserves the right of re-entry in all cases where the landlord cannot himself by a distress obtain the payment of the rent. This, it was argued, arises by the necessity there is (even after entry) in obtaining judgment and execution in an action of covenant before possession can be obtained; and the relief which the courts both of law and equity, and more particularly the latter, give, independently of the provisions of that statute, in cases of forfeiture for nonpayment of rent. But let us see how the case as to this point stands: If the right of re-entry reserved had been merely for nonpayment of the rent, in the terms of the right of re-entry required by the leasing power, it is clear, I take it, that on a due demand of the rent being made (and by

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property of the tenant, or of third persons, —of waiting, where the distress is of standing corn, until it is ripe and cut (for till then it cannot by the statute be appraised or sold for payment of the rent,) but also of incurring the trouble, delay and risk attending the making the distress in such manner as is in no respect illegal, either by reason of the manner of making or disposing thereof, or by reason of the distrained property being privileged from distress by the same being in the way to market, or by reason of trade or otherwise. Not only is the remainder-man driven to this trouble, but the tenant may also deprive him of the power of sale by a replevy of the distress ; and it may happen at the end of the replevin-suit, that by the eloignement of the distrained property the insufficiency of the pledges in replevin, and the insolvency, or death without sufficient assets unadministered of the sheriff and the tenant, his remedy by distress may finally fail, with the additional loss and costs both of the distress and of the replevin-suit ; and if this does not happen, he may still be without his rent unless he take upon himself the trouble and expense of prosecuting execution *pro retorno habendo*, or for his debts and costs, and the trouble and risk of prosecuting some further action or actions against the sheriff or the bail in replevin in case such execution shall prove ineffectual ; and his remedy by ejectment would be in that case delayed until these results of the replevin-suit shall have been ascertained, even if an action of ejectment would then lie for the nonpayment of that rent which had been before distrained for. So that after the termination of the distress

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and replevin-suit it may happen that the remainder-
man may lose his rent, with the addition of cost~~s~~.
The payment of the rent is not, therefore, I think,
as effectually and beneficially secured by the right
of re-entry actually reserved as if that right had been
reserved in the words of or according to the leasing
power.

I have considered the question as above, inde-
pendently of the disputed authorities of *Coxe v.*
*Day**, and *Doe dem. Vaughan v. Meyler*,†
both which cases I think were rightly decided, not-
withstanding the prior case of *Holley v. Scot.* I
have considered the question, too, as if in the lease
the rent reserved had been a money-rent only, be-
cause it has been so treated in the arguments here,
and in the courts below. But it is to be observed
that this is the case, not of a lease for a money-rent
only, but also for a rent of another nature, although
certainly a very small one, namely, the additional
rent of a couple of fat capons, or money, at the elec-
tion, not of the tenant, but of the lessor or remainder-
man, who would therefore be entitled, if he pleased,
to have that rent in kind instead of money. It has
been considered on all sides as the case of a lease for a
money-rent only. I presume on this ground that the
special right of re-entry depending on the want of
a sufficient distress does not apply to this addition~~al~~
rent or reservation, but to the money-rent only, and
that the right of re-entry applicable to this addition~~al~~
rent is the general right of re-entry subsequent~~ly~~
given by the lease, in case of default in payment ~~or~~
performance of any of the reservations, covenant~~s~~.

* 13 East, 118.

† 2 M. & S. 276.

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&c. : and this may be the case if the statute 2 W.
 & M.* which is the statute giving the power of
 sale of a distress for rent, be deemed to be confined
 to money-rents only. But if the default of payment
 of this additional rent be within the special rights of
 re-entry depending on the want of a sufficient dis-
 tress, more especially if this kind of rent be also not
 within the above statute of William & Mary, so
 that the distress could not be sold under that statute
 for the purpose of raising or paying that rent, though
 if it could be sold for that purpose it would not
 raise the rent in kind agreeable to the landlord's
 right of election, but in money only, at least not
 without additional trouble and expense to the land-
 lord of purchasing the rent in kind with the money
 raised by the sale, that is, either by doing it himself
 or procuring another to do it, I say that in such
 case the question proposed to us by your Lordships,
 as it appears to me, would embrace still further con-
 siderations arising from those circumstances, as the
 distress for that small rent in kind, viz. the two
 capons, would in that case, that is to say if it could
 not be sold under the statute, remain only a dry,
 unprofitable, chargeable pledge for that rent, in lieu
 of the productive security and enjoyment of the land.
 This however it is unnecessary for me to consider,
 inasmuch as whether the additional rent in kind
 would embrace further considerations as to the law
 of the case or not, I think, for the reasons which
 I have before stated, that having due regard to every
 thing alluded to in the question proposed to us by
 your Lordships, the lease in question is invalid.

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Park, J.—The objections to this lease are two: viz. that it does not pursue the power, inasmuch as a clause is required to be in every lease in these words: "So as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved," and nothing more: whereas it is said this lease contains a power of re-entry, not *generally*, but clogged with two conditions,—"*Provided the rent, &c. shall be behind and unpaid, &c. for fifteen days, and no sufficient distress can or may be had or taken upon the premises.*" And these two objections fall under very different considerations; but it must be admitted that if either of them prevail the lease is invalid. As to the general rules which govern the courts in the construction of leasing powers they are all now well understood, and have been so fully explained and commented upon by some of my learned brethren who have preceded me, that it would be a silly parade of learning, and a useless waste of the time of the House to enter upon them; it being sufficient to state that the intention of the parties, which is to be collected from the instrument, is to be the governing principle in the construction.

never that such a plain man, in my conception, would be grievously surprised to find two conditions, which he will in vain look for in the power, but which materially alter the rights of the remainder-man. The power to make leases is to be construed so as to lean neither to the one party nor the other, for the maker of the power certainly intended that they should operate for the benefit of both, of the one, by giving him the enjoyment during his life of an estate well cultivated, of the other (*viz.* the remainder-man), by preventing him from coming to an impoverished one.

It seems to me that to contend for what is insisted on by the Plaintiff in error is to say, that "absolute" and "conditional" mean the same thing; or, that a power clogged with two conditions is the same thing as an unclogged and unconditional power. When this case was before the Exchequer Chamber I stated, that if the only objection to this lease were the time given, before the lapse of which he could not re-enter for nonpayment of the rent, as then advised, I should think the objection fatal. I have heard nothing since to remove my doubt. It is said indeed that the indefinite article *a* being used, namely, *a* power, *any* power that is reasonable may be inserted. But what right have we to do this for the grantor of the power? Who has a right to insert this word? Who, if inserted, is to construe it? The court or the jury? If fifteen days be reasonable, why not twenty, twenty-five, and thirty? That this was never contemplated I think quite clear; for whenever time is meant to be given it is expressed, and therefore she must be presumed to

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have known that where she meant to give time it ought to be expressed, lest the giving it in one case should be construed, as it is by me, that it was not intended to be given in the other. But I have said, and I repeat it, what right have we to insert the word "reasonable" into this power? If this word "reasonable" never found its way into powers, it might perhaps more fairly be argued that it was inherent in all. But looking at precedents and adjudged cases we do find the words "usual" and "reasonable" sometimes jointly introduced, sometimes separately; and these words when introduced compel the courts to consider what are usual—what are reasonable covenants—under such powers. If then it is not unusual to insert such words, why are the courts to introduce them where the creator of the power has not; and who by omitting them must be taken to have intended that they should not be inserted? But I am staggered by what is said in a book of great authority, and to which I think the Professional Public are much indebted*, that if this objection were to prevail it would invalidate nine tenths of all the leases in the kingdom granted under powers. I can only say such a consequence is to be deeply deplored; but it is entirely owing to this, that those who have prepared such leases have chosen to follow their own new-fangled conceits, instead of using the exact words of the power conferring the right to lease upon certain terms, and upon certain terms only. This argument, that many leases will be invalidated, may be a very good one to your Lordships in your legislative capacity,

* Sugden on Powers.

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on account of the hardship of the case, but cannot, and ought not, to influence you when your province is *jus dicere, non dare*. However, if this were the only objection to the lease in question, on account of the long practice which has prevailed, as it is alleged, I might be inclined to pause before I presumed to offer my humble advice to your Lordships, that on this ground alone the lease would be void.

But the second objection seems to me to be impossible to be got over. I have thought much about it, both before I gave my judgment in the Exchequer Chamber, and since. I have turned it in every point of view; I have heard all that learning and ability at the bar could suggest; I have of course been present at all the conferences with my learned brethren; I have been most desirous to be convinced if my opinion be erroneous; but after all I cannot rise in my mind a probable doubt; and though if the decision of your Lordships should be ultimately

in favour of the lease it will be my duty to conform to that opinion, I am at present bound to state my concurrence in this point with my learned brethren, Richardson, Burrough, and Holroyd, who preceded me. Their luminous exposition of the argument, and my own judgment in the Exchequer Chamber, which is very accurately reported, by Messrs. Broderip and Bingham, and by Moore, and which is in the possession of some of your Lordships, render it unnecessary for me to say more on this head than to make an observation or two on the cases that have been quoted.

The main reliance on the other side is on the case *Hotley v. Scot*, Lofft, 316. Of that reporter

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I shall say no more than this (without forming any judgment of my own), that during a long professional life of forty years, and Lofft's reports embracing a period of that great man's life who then presided in the Court of King's Bench, during which, as to this part of them, there is no other reporter (for the reports of the very learned person now at your Lordships table * did not commence till 1774, nearly two years after Mr. Lofft's), I never heard them quoted three times in my life. But without any observations of this kind, it is quite clear from that report that none of the learned counsel then at the bar, neither Mr. Dunning nor Mr. Bearcroft, neither my Lord Mansfield nor any of the Judges, appear to have taken the least notice of the condition as to the want of a sufficient distress, which is the very point now under consideration, and which from the terms of the power and lease in that case might have arisen. But it is said there is a note of that case by Mr. Butler, taken by himself, in which it appears to have been mentioned; I have not seen that note, and therefore I can say nothing to it. I entertain great respect for that gentleman, and I do not wish to depreciate the labours of the young; but unless he be much more advanced in life than, for the sake of the public I wish him to be, he must forty-eight years ago have been a very young man. But, admitting the point to have been mentioned, it cannot have formed a prominent feature either in the argument at the bar or in the consideration of the court, for if it had it is impossible that Mr. Lofft, or any other man, in a report

* Henry Cowper, Esq.

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four pages should have omitted it. Can such a case for a moment be put in competition with *Coxe Day**, where this clause was the main objection to the lease, a case most ably argued at the bar by the now Chief Justice of that Court, and receiving the deliberate certificate of four very eminent Judges, Lord Ellenborough, Justices Grose, Le Blanc and Bayley? In the course of that argument Lord Ellenborough said, "There can be no doubt that it is more beneficial to the owner of the estate to have a power of re-entry *at once* upon the tenant, upon nonpayment of the rent within a certain time, than to have such a power only *in case* there shall be no sufficient distress upon the premises." In another place, when Mr. Abbott was strongly urging on the Court that such a clause secured the landlord's object, namely, satisfying his rent more easily than in any other way, Lord Ellenborough, in answer, "In the one case it is to be secured from time to time by successive suits, with the risk of sureties if the distress be replevied; in the other, it is secured once for all by the landlord's dispossessing himself of the land out of which the rent is derived." Can any one say, my Lords, that the one remedy is not more easy, more direct, less circuitous than the other? And that great Lord Ellenborough, again says, "Surely the direct power is more beneficial to the landlord." If the certificate of all the learned Judges is in direct conformity with these *dicta* of Lord Ellenborough; for it is said, "We are of opinion that the power of re entry reserved in and by the

* 13 East, 118.

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“ said lease for nonpayment of the rent is not made
 “ in conformity to the power in the settlement for
 “ granting leases of the freehold part of the said
 “ premises, and that the lease is void on that
 “ ground.” Not having seen any report of the judgment of the Court of King’s Bench upon this case of *Doe dem. Earl Jersey v. Smith*, I cannot tell whether this case of *Coxe v. Day* was recalled to their attention; but I am quite sure it is impossible to reconcile the one with the other. This was so strongly felt by two very learned Judges in the court below, that at once they doubted the propriety of that decision; and one of them says, “ it is
 “ not law, for it is diametrically opposite to reason
 “ and common sense*.” I am sorry to say I think directly the contrary; but I, for one, seriously object to this mode of getting rid of decisions, because they militate against our own notions. I agree with the pointed manner in which this was expressed lately in this House by the Lord Chief Justice of the Court of Common Pleas, and I hope I shall be excused for using his language. “ If the law so settled is now to be considered unsettled, I know not on what foundation, in point of law, any decision can stand. †”

But the case of *Coxe v. Day* is not a solitary case, for the question again, in about three years after, came under the consideration of three of the same Judges who decided *Coxe v. Day*, namely, Lord Ellenborough, Judges Le Blanc and Bayley, with the addition of another learned person now no more (Mr. Justice Dampier), and who could not

* Vide ante, vol. 1, 195. † Vide ante, *Rowe v. Young*, 273-

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have decided as they did without determining that such a clause as we are now considering rendered a lease void where the power did not authorize it. The case I allude to is *Doe dem. Vaughan v. Meyler* *. The case was tried before the latter Judge at Hereford, who thought the objection, such as we have here, was one that went to the whole lease, though it was partly of lands of which the lessor was seised in fee, and partly of lands in which he had only an estate for life with a leasing power, provided there was a clause of re-entry for nonpayment of rent for fifteen days. The lease was not executed according to this power, for it added, "and if there be no sufficient distress;" but the Court held, though the lease was void, because not executed according to the power, yet it was good as to the land of which the lessor was seised in fee, and the Court apportioned the rent; which was an erroneous judgment, if the objection to the present lease be not a good one.

The case of *Rees on the demise of Powell v. Mag.†*, I formerly thought, and still think, sets this point at rest, by showing that such a clause as this imposes a burden upon the right of re-entry which the maker of the power never contemplated. That has been so often mentioned that it is enough to say of it that it has decided, that before a plaintiff in ejectment can recover upon a clause of re-entry in a lease, in case there be no sufficient distress on the premises, he must show that every part of the premises has been searched, else he cannot say there is no sufficient distress. The Judge who first

* 2 M. & S. 276.

† Forrest, 19.

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decided this was well known to some of your Lordships, and no man will decry the knowledge of the late Mr. Justice Heath, and his opinion was confirmed by the Court of Exchequer. If the Courts of Westminster Hall were to overturn that decision it would go a great way to shake my present opinion; but I do not learn that any of my brethren are prepared to do so; and if, therefore, I feel myself bound, as I shall feel, to call upon any plaintiff in ejectment on the circuit, who has such a clog on his clause of re-entry as this, to prove that he has made a full search for a distress before I permit such a plaintiff to recover, I cannot conscientiously advise your Lordships that this lease is valid; most sincerely, however, wishing that consistently with my honest opinion I could do so.

Of one other point I must take notice, namely, that as this lease contains a general clause of re-entry it must necessarily control the special clause. To that position, I, for one, at present, cannot agree; for I find the contrary doctrine maintained, from Altham's case * down to the present day. In Altham's case we find this position or rather this maxim adopted. In the first part of the argument, putting every point that can possibly occur, his Lordship says, "*Quando carta continet generalem clausulam, posteaque descendit ad verba specialia, quæ clausulæ generali sunt consentanea, interpretanda est carta secundum verba specialia.*" But he goes on to add, there is another rule or principle of law, viz. "*generalis clausula non porrigitur ad ea, quæ antea specialiter sunt comprehensa.*"

* 8 Co. 154, b.

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Therefore, I say, this point for which I am now arguing being first specially defined cannot be enlarged by a subsequent general clause, which can only apply to cases not before specified or defined. So in Sheppard's Touchstone (which is supposed to be the work of no less a man than Mr. Justice Doddridge) on the exposition of deeds *, in confirmation of the above doctrine, that writer says, "If there be two clauses or parts of the deed repugnant to one another, the first part shall be received and the latter rejected, unless there be some special reason to the contrary." If we descend to more modern times, we find the same rule universally adopted and confirmed by Judges on particular cases depending before them. In *Cothor v. Merrick* †, Mr. Baron Nicholas, quoting the Year-Books in support of his opinion, says ‡, "When there are two clauses in a deed of which the latter is contradictory to the former, there the former shall stand." And not to multiply authorities upon a point on which Lord Ellenborough intimated a strong opinion, when he expressed himself against the validity of an argument founded upon such a point, I shall only quote one more from what Lord Chief Justice Holt and two of his brethren said in *Thomas v. Howell* §, that "in deeds it was admitted that subsequent clauses which are general shall be governed by precedent clauses which are more particular." I therefore think that this ground does not, in any way, strengthen the argument as to the validity of the lease.

* Ch. 5, p. 88, fo. 7.

† Hardr. 89.

‡ Hardr. 94.

§ 4 Mod. 69.

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The point upon the statute of 4 Geo. 2, has been so luminously explained by my learned brother Holroyd, that I shall not trouble your Lordships on that point, except to say I entirely concur with him.

The next point is, whether the other leases should be admitted as evidence? I am willing to admit that if this deed upon the clause in question contains any latent ambiguity raised by extrinsic evidence, parol evidence or extrinsic evidence may be admitted to explain it, or to render it unambiguous. But I have never heard the general rule contradicted, that parol or extrinsic evidence cannot be admitted to contradict, vary, or add to the terms of a deed. It would be of most dangerous consequence to admit such testimony; for then, parties dealing in matters on writing made upon advice and consideration would be subjected either to the uncertain testimony of vague and precarious memory, or, as in the case at bar, to matter, of which at the time of contracting they might have no knowledge, and never intended to be under its control. The written instrument, therefore, except in cases of fraud, or other excepted cases, of which I insist this is not one, must be considered as speaking the sense of the parties to that deed or instrument. Upon this ground it was, I conceive, that the case of *Cooke v. Booth* * met with such a decided opinion against it in *Baynham v. Guy's Hospital* †, by Lord Alvanley when Master of the Rolls, who not only states his own opinion, but that of Mr. Justice Wilson, who had argued the case of *Cooke v. Booth*, (who, Lord

* Cowp. 819.

† 3 Ves. jun. 298.

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Vanley says, was astonished at the decision) as well as that of Lord Thurlow. The Master of the Rolls says, "I protest against the argument of the learned Judges as to construing a legal instrument by the equivocal acts of the parties, and their understanding upon it." The case of *Tritton v. Foote* * seems directly at variance with *Cooke v. Booth*. In *Ingulden v. May* † the Court of Exchequer Chamber, unanimously affirming a judgment of the Court of King's Bench, held, that a covenant in a lease to grant a new lease, with all covenants, grants, and conditions as in the said indenture is contained, does not bind the lessor to insert a covenant of renewal in a renewed lease, although it was alleged in the pleadings that the covenant required had been introduced in various other cases before then successfully made and executed on renewals from time to time granted. Lord Chief Justice Mansfield, stopping the then Mr. Abbott, who was to have argued against the construction contended for on the other side, said, that the case of *Cooke v. Booth* was the first time that the acts of the parties to a deed were ever made use of in a court of law to assist the construction of a deed: and in another part of his judgment his Lordship says that case had been impeached upon all occasions, and that the Court of King's Bench were misled by the renewals stated in the case sent by the Court of Chancery. Now what is asked for in the present case but to assist the construction of an unambiguous deed by the prior acts of the parties? In a case which I argued as

* 2 Bro. C. C. 636.

† 2 N. R. 449. See the original case and pleadings, 7 East, 237.

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counsel *, though the lease there was according to the custom of the country as to the times of holding, yet the lease, dated 29th March, was held not to be a lease in possession, within a power to grant in possession, and not in reversion, because the days of holding were as to the tillage from 13th February past the pasture ground from 5th April next, and the residue of premises from 12th May next.

But, my Lords, in my opinion no cases are wanting to prove that no evidence can be admitted to explain a deed which is plain and perspicuous in its terms, containing no ambiguity, much less to add clogs and conditions to it. I am asked then, is this a deed of that description? I answer, that in my opinion it is. I see no ambiguity; it is precise and definite in the powers granted; every person of plain and common understanding, much more every person with a legal mind, can give it a clear and satisfactory solution. But I am told the case of *Fonnereau v. Poyntz* †, before Lord Chancellor Thurlow, is against my opinion. Upon the best attention I can pay that case I do not think so. The case was a bequest of the sum of 500*l.* stock in long annuities, and similar bequests of smaller sums in the same stock. The question was, whether this was a bequest of 500*l.* a year long annuities, or only 500*l.* in the long annuities. This case was very powerfully argued by one of your Lordships; I own I should have thought there was no difficulty in the construction; and Lord Thurlow seemed at first to be of that opinion, but afterwards admitted evidence

* Doe, dem. *Allen & others, v. Calvert*, 2 East, 376.

† 1 Bro. C. C. 472.

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to show the extent of the property of the testatrix, to see whether she could possibly mean 500*l.* a year, when she had no such stock. But though his Lordship admitted this, he states the clear principle of law to be, that for the wisest reasons it will not admit of an instrument being construed *aliunde*. And in the close of that case his Lordship says, what I quote to your Lordships as strong in my favour, because he only lets in the evidence to explain what is uncertain, “ There is no doubt, if the word *stock* had been left out, but the meaning would be that the sum of 500*l.* was to be disposed of in long annuities, and to make a produce, and that produce to accumulate until the legatee should attain twenty-one. This being the doubtful interpretation upon the face of the will, the question arises whether the state of the testatrix’s fortune is not applicable to the construction of the will. It appears by some other parts of the will that she was extremely anxious to make an ample provision for the family of the *Fonnereaus*; considering then the situation of her fortune, it is perfectly inconsistent to say that she could mean to give ten times more than she was worth in legacies. My opinion therefore is that the judgment must be reversed, and that I can let in the evidence of the value of the estate, not to control the bequests, which the testatrix has made in words themselves distinct, nor to control the bequest which she had made of a subject which she had accurately described, but because the words she has used in the description are upon the whole of the context uncertain.” “ The peculiarity of this will furnishes sufficient doubt to warrant the

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admission of collateral evidence to explain it ; and if so, the statement of the testatrix's fortune is applicable to the purpose of such an explanation." His Lordship, whether right or wrong in his notion, clearly admits evidence *aliundè* on the ground of uncertainty and ambiguity only, and leaves the principle wholly untouched, that parol evidence, or evidence *aliundè*, cannot be admitted to contradict, add to, or vary the terms of a deed, will, or other written instrument. Now here the terms of this power are clear and express, without limitation, clog, or condition, nothing being doubtful or ambiguous ; and the evidence sought to be admitted is not to explain that which is doubtful, but to add two clauses or two conditions to that which is absolute and unconditional : in short, to make a new deed in this respect.

The decision I am humbly recommending steers clear of all vagueness and uncertainty ; leaving nothing to the variety of conflicting opinions. For who is to decide what is reasonable ? If the Judges, as I should be inclined to think,—(but worse, if the jury) are,—what can lead to such contrariety of decision ? We all know, in every transaction of human life, what is held reasonable or unreasonable depends upon the reasoning and feeling of every individual man who has to consider the question.

I heard it said this will unsettle many leases. I lament that it is so. The Legislature may interpose ; but if my mode of construing powers had been always adhered to no such evil could have ensued. The hardship of the individual case is represented ; and if there be hardship, I also, as an

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individual, lament it ; and this statement of hardship, and the consequences of what I should propose, have made me, again and again, examine this point with all the ability in my power : but after all this consideration, feeling that it is my sworn and therefore bounden duty to declare what I believe the law to be now, not to say what it ought to be, I think that to decide in favour of the lease would be to make a power differing substantially from that which was made, and making conditions which the creator of it never intended. This would be my opinion if I stood alone ; but I am happy not to be singular in my judgment on this important question, although I am opposed to others whose ability I respect, and whose learning I revere.

Bayley, J.—I am of opinion that the lease in this case is conformable to the leasing power, and that it is valid. Nor do I think that that opinion will trench on the case of *Coxe v. Day*. The settlement in this case requires “ a power of re-entry for non-payment of the rent ; ” and the first question I propose to consider is, whether this lease does or does not contain “ a power of re-entry for non-payment of the rent ? ” It provides, that if the rent be behind for the space of fifteen days, and no sufficient distress can be had upon the premises, the person entitled to the freehold and inheritance may re-enter. Is this then, or is it not, “ a power to re-enter for non-payment of the rent ? ” Does it give any power to the landlord ? Undoubtedly.—To do what ? To re-enter.—For what cause ? For non-payment of rent. It is then a power of re-entry for non-pay-

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ment of the rent. I admit it is not an immediate power of re-entry; I admit it is not an unconditional power; but still it is a power of re-entry. In referring to Littleton, s. 325, I find instances of powers of re-entry if the rent be behind a week, or a month, or half a year; and as far back as the year-books* it is established, that under such powers the time to demand the rent to warrant a re-entry is at the end of such week, month, or half-year, and not on the preceding rent-day; so that it is consistent with a power of re-entry that it should not be immediate, but postponed till some given time after the rent should have accrued; and in Godbolt† I find the instance of a power of re-entry if the rent be behind, and there be no sufficient distress upon the land; and from these instances I infer that a power of re-entry, if the rent shall be behind fifteen days, and there is no sufficient distress upon the premises, is "a power of re-entry for non-payment of rent." It may not be the most beneficial species of power; it may be clogged with what in some cases may, by possibility, produce an inconvenience, but still it is a power. And if it be a power of re-entry for non-payment of the rent, this lease does contain what (in the words of the settlement) is "a power of re-entry for non-payment of rent;" and persons who impeach the lease are then driven to the argument, that though it be a power, yet it is not such a power as, having due regard to the intent and meaning of the indenture of the 2d July 1757, that indenture according to legal construction

* 20 H. 6. 30, 31. 6 H. 7. 3. Brooke, *entre congeable*, pl. 90.

† 110, pl. 130.

requires. Now this argument assumes that the words are capable of more than one meaning, if they are not so clear and precise and definite as to admit but of one sense; and it was to point out this assumption that I have been troubling your Lordships upon what might otherwise have appeared nearly a self-evident proposition. The words are "a power of re-entry for non-payment of the rent." The law knows of many such powers; some more beneficial, some less so; some qualified, some not; some to hold the land till the rent is satisfied out of the profits; some to hold till the rent is satisfied *à fondé**; some, as here, to restore the reversioner to his former estate; and some with the conditions, which I have already noticed, viz. postponement of time, and absence of distress upon the land; and some (though very few) with neither of these conditions. And which of these powers, having due regard to the intent and meaning of the indenture of 2d July 1757, does that indenture, according to legal construction, require? The intent and meaning of that indenture is to be collected either from that indenture, without looking out of it or beyond it, or from that indenture, combined with the consideration of the state of the property at the time when that indenture was made, if the evidence of the then existing leases, and of the powers therein contained, which I shall by-and-bye consider), be admissible. The intent and meaning of that indenture (*per se*, and without looking beyond it or out of it) was, as it seems to me, that the reversioner should have such of those powers as would give him a proper and rea-

* Co. Litt. 293. a.

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landlord the benefit of 4 Geo. 2, c. 28, where there is such a distress; and because a landlord can have no difficulty in ascertaining whether there be such a distress or not. He has a right to enter with his writ upon the premises, to see whether there be such a distress; and according to Godbolt*, if there

nothing that he can see upon the premises to restrain him he is warranted in concluding that there is no distress there. Godbolt's words are, "It was holden by all the justices that if a man make a lease, rendering rent upon condition that if the rent be behind, and no sufficient distress upon the land, the lessor may re-enter; if the rent be behind, and there be a piece of lead or other thing hidden in the land, and no other thing there to be distrained, the lessor may re-enter; for the distress ought to be open and to be come-by." I am therefore of opinion that, without looking beyond the indenture of July 1757, the power in question is within the true intent and meaning of that indenture and the legal construction thereof as large and beneficial a power of re-entry as that indenture required.

But I apprehend that in judging of the true intent and meaning of the indenture of July 1757, in this respect, we are at liberty to look at the state of the property at the time that indenture was made, and see to what restrictions it was then subject, and what rights the settler then had. The settler has used the indefinite words, "a power of re-entry." In showing, as I do, that there are many such cases, I show that there is an ambiguity in those

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words, either latent or patent ; and may I not to the existing state of the property at the time these words were used, to see what was the intention of the settler, and in what sense she used the words? This is the first time I have ever known doubted whether the estate and interest and power of the settler over the estate he was settling was admissible in proof. I am not offering declarations of what the party said she meant ; I am not construing a legal instrument by the acts of the party or by their understanding upon it (as in *Cole v. Booth**) ; but by showing the circumstance and situation of the party, and the estates and interests she had at the time, I am enabling the House to judge what in legal construction was her meaning. And I am not aware that there is any legal authority to exclude the evidence of such circumstance and situation. *Doe v. Calvert*† certainly is not. That case only decided that a lease of 29th May tillage-land from 13th February preceding, of pasture-land from 5th April, and of the residue from 1st May, reserving the rent in April, was substantial evidence of a lease from April, and therefore a lease in possession but in reversion ; and the custom of the country, that these were the ordinary periods for letting, was admitted without objection, and acted upon without objection, but was held not to confer the power so as to warrant a lease before April. If a man makes any deed or will, have I not a right to know what estate he had at the time he made the deed or will ? and does not the construction vary in some cases according to the estate ? If I grant

* Cowp. 819.

† 2 East, 376.

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can an estate for life, without saying whether for his life or for mine, is not evidence admissible to show what interest I had in the premises? For if I was tenant in fee he will take an estate for his own life; if I was tenant in tail, or for life only, he will take for mine*. If a man bequeath me 10,000*l.* 3 per cent consols, it will be a specific legacy if he have that stock at the time; not specific, if he have it not, *Selwood v. Mildmay*†. Evidence is therefore admissible in such case to show what was the state of his property at the time he made his will, and the construction upon the will is one way or the other, according to the result. In *Masters v. Masters*‡, where a lady by her will gave 5*l.* to each of two hospitals in Canterbury, and by her codicil gave 5*l.* per annum to “all and every the hospitals,” the latter legacy would have been void for uncertainty; but it appearing (which must have been by extrinsic evidence) that the testatrix lived at Canterbury for many years, and died there, and that she took notice by her will of two Canterbury hospitals, the general words “the hospitals” were limited and considered as intended for “all the hospitals in Canterbury.” But the case to which I wish to call your Lordships particular attention is *Fonnereau v. Poyntz*§. The testatrix there gave to Mary Poyntz the sum of 500*l.* stock in long annuities; to Mary Haye the sum of 500*l.* stock in long annuities; to Miss J. L. Barbould the sum of 200*l.* stock in long annuities; the interest thereof to accumulate till she attain twenty-one; the sum of

* 1 Shepp. Touch. 88.

† 1 P. Wms. 421.

† Per M. R. 1797. 3 Ves. 310.

§ 1 Bro. C. C. 472.

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100*l.* stock in long annuities to Miss H. Dawson in like manner; and the residue of her estate both real and personal to her two nephews. Parol evidence was given that the testatrix had only 120*l.* per annum long annuities; but Lord Thurlow doubted at first whether he could admit that evidence to explain the words; and he afterwards decreed against receiving it, because he thought it would produce a construction against the direct and natural meaning of the words. But upon a re-hearing he admitted the evidence, and acted upon it; and the ground of his decision was, that upon the face of the will itself it was doubtful whether the testatrix meant to give legacies of 1,300*l.* per annum, or only a gross sum of 1,300*l.*; and he considered the state of the testatrix's fortune applicable to the construction. The situation of the fortune made him conclude she never could have meant to give in legacies ten times more than she was worth; and he let in the evidence, not to control a bequest which was distinctly and accurately described, but because upon the whole context it was uncertain whether she meant so much per annum, or so much as a gross sum. He thought the peculiarity of the will furnished sufficient doubt to warrant the admission of collateral evidence to explain it; and that the statement of the testatrix's fortune was applicable to that explanation. Lord Thurlow decided that therefore as a case of ambiguity; as a case in which, from the use of the doubtful expression "sum of 500*l.* stock," and the "interest thereof," he might let in the extrinsic evidence of the circumstances of the testatrix to explain what was her

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meaning. In noticing this case * Lord Alvanley says, Lord Thurlow's only doubt was whether parol evidence was admissible to ascertain whether the testatrix did not mean capital, but *he had no doubt he must know all the circumstances of her affairs.* Apply that case to this. The evidence here is not to produce a construction against the direct and natural meaning of the words; not to control a provision which was distinctly and accurately described; but because there is an ambiguity upon the face of the instrument; because an indefinite expression is used capable of being satisfied in more ways than one: and I look to the state of the property at the time, to the estate and interest the settler had, and the situation in which she stood with regard to the property she was settling, to see whether that estate, or interest or situation, would assist us in judging what was her meaning by that indefinite expression. And then the case will stand thus: Lady Louisa Barbara Vernon being tenant for life, with power of appointment in fee, of a very considerable estate, part of which was then out upon leases for lives at small rents, payable partly in money and partly at her election in fat capons, subject to powers of re-entry if those rents should be behind fifteen days, and there should be no sufficient distress upon the premises, settled that estate with powers to make life-leases of that part of the estate at the ancient rents, so as those leases should contain *a power of re-entry* for nonpayment of the rent thereby reserved; and with power to make leases at rack-rent of the other parts of the estate, so as those leases

* 3 Ves. 320.

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should contain clauses of re-entry if the rent were in arrear twenty-eight days ; and then the question is, whether by requiring upon the life-leases generally “ a power of re-entry ” she required more than that description of power which the then life-leases had. She must be taken to have known what that power was ; and had she been dissatisfied with it, or required any alteration, can it be supposed she would have contented herself with the indefinite expression “ a power of re-entry ? ” When she is providing for the rack-rent leases, where the right of distress is much more important, she gives the tenant twenty-eight days ; and can it be believed that she intended to be less indulgent where the rent bore scarcely any relation to the value of the property ? I cannot believe she did ; and for these reasons, because the settler has not said what particular species of power she required, and this is a reasonable power, and the very power in force upon this estate at the time this settlement was made. I submit to your Lordships that this lease was warranted by the power, and that the judgment of the King’s Bench ought to be affirmed.

Wood, B. :—I am of opinion that the power contained in the marriage settlement is well executed. That power applies to lands “ leased for lives, or for “ years determinable on lives, to any person or “ persons in possession or reversion ; ” and one of the conditions of such letting is in these words, “ and so as there be contained in every such lease “ a power of re-entry for nonpayment of the rent “ thereby to be reserved.” There is another power

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of re-entry which applies to leases for years absolute, not exceeding twenty-one years, to take effect in possession, and to be made at as beneficial yearly rent as was then paid, or the most improved rent, without fine or foregift; and there it is provided that there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the time appointed for payment.

The lease in question is under the first power, which provides re-entry on non-payment of the rent generally, without prescribing any time of re-entry at all, or any special terms whatsoever. The proviso in the lease in question is, if the yearly rent of 2 l. or any of the duties, services, reservations, and payments thereby reserved shall be behind, unpaid, or undone in part or in all, by the space of fifteen days after any of the times of payment or performance, and no sufficient distress or distresses can be had or taken whereby the same and all arrearages may be raised. It is contended on the part of the Defendant in error that this proviso of re-entry in the lease is not such a one as is required by the settlement, inasmuch as it has limited a time for re-entry, which the power has not; and inasmuch as it is clogged with a condition, that there be no sufficient distress, which the settlement does not mention.

The clause requires no more than a power of re-entry for non-payment of rent, giving it no qualification or modification at all. There is a clause of re-entry, and that is a literal compliance. But though the power is general, I admit it must be exe-

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cuted, not in a fraudulent or illusory manner, but in a reasonable manner, such as the law will deem reasonable. In the clause of re-entry for the rack-rent the time is limited, viz. twenty-eight days. I admit that cannot be departed from. Why was the time limited in this?—Because the settlement meant to leave it to the discretion of the tenant for life to insert such a reasonable power of re-entry as might secure the rent to the reversioner. The object of re-entry is merely to secure the rent, and has been always so considered in law and equity; and when I see that object is secured reasonably and fairly and we are not tied down to any specific terms I think the power is well executed, being according to the intention of the parties. I think we ought to consider the deeds and acts, *ut res magis valeat quam pereat*. In *Cotter v. Merrick* * in the Exchequer, on a special verdict, the question was whether the lease was a good lease within the statute 32 H. 8, c. 28. That statute is to enable tenants in tail to make leases to bind as if they were tenants in fee simple. The second section is, provided such leases be not for more than twenty-one years, and provided that upon every such lease there be reserved, payable to the lessors, their heirs and successors, to whom the said lands should have come after the deaths of the lessors if no such lease had been thereof made, and to whom the reversion thereof shall appertain, according to their estates and interest, so much yearly ferm or rent, or more, as had been accustomably paid. The lease was made reserving the rent to the heirs and assigns of the

* *Hardr.* 89.

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lessor, who were not the heirs in tail entitled to the rent, yet it was held a good lease. Hill, B. says, "In the exposition of statutes, the Judges must make such a construction as to advance and not to frustrate the intention of the makers." Parker, B. says, "It is the office of a Judge to preserve and not to destroy an estate." In this case the Judges gave their rational construction to the lease, which gave it effect. So, here, in this case before your Lordships, I conceive we ought to do the same, taking the true interpretation of the power to be to leave the mode of re-entry to the direction of the lessor. Has that been fairly and *bonâ fide* and reasonably executed? Is the period of fifteen days a reasonable time to allow for re-entry? In the case of rack-rent twenty-eight days is expressly given; if the parties have thought that a reasonable time, surely the fifteen days must be; it is the usual time as found by the jury; the law will judge what is a reasonable time.

The last objection, which was mostly if not entirely relied on, was the clogging the right of re-entry with the condition of their being no sufficient distress. Is that reasonable with reference to the law as it stood when the lease was made? I conceive it is. The 2d July 1757, was the date of the deed of settlement which gives the power of leasing, and which was subsequent to the statute of the 4th Geo. II, c. 28, which was in the year 1731, which regulates the powers of re-entry for the nonpayment of rent. Before the making of this statute, the carrying into execution a power of re-entry was attended with great difficulty and nicety. There must have

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been a demand of the rent upon the land; if there were a house, it must have been demanded at the fore door; and it must have been demanded at a convenient time before the sun-setting of the last day of payment, so as that money might be numbered and received. The landlord then had to make an actual entry and bring an ejectment. If all these circumstances were not critically and exactly performed he lost the right of re-entry for that time, and was forced to wait till other rent accrued, and then had to make fresh demand and re-entry for the subsequent rent. If he had complied with these formalities, and brought his ejectment, it was the uniform practice of a court of equity to relieve against a forfeiture upon payment of the rent and costs, considering the clause of re-entry as a mere security for payment of rent. What is the alteration made by the statute? It has dispensed with the formalities attending re-entries by the common law, and said that when the landlord has a right to re-enter, and half a year's rent is in arrear, he shall and may at once bring his ejectment and recover possession, provided there is no sufficient distress to be found on the premises to countervail the arrears then due. The tenant also may pay or tender the rent and costs to the landlord or his attorney, or pay the same into court before trial, and all proceedings shall cease. The policy of this law is to prevent forfeiture for nonpayment of rent, and to facilitate the landlord's remedy for the recovery of it; and at the same time the Legislature has thought it right to impose this condition:—you shall not eject the tenant if there be a sufficient distress to secure the

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rent ; you may have an action or a distress as soon as the rent is due, without waiting fifteen days. It is said, " still the statute leaves the common-law remedy open to a landlord if he will comply with the formalities of demand at the last hour of the day, and make re-entry ; and in that case the necessity of distress is not imposed on him." What then ? Why the tenant will be relieved against the forfeiture in a court of equity ; yet it does not seem clear, even in that case, that the statute does not shut the door against proceedings by re-entry at the common law ; but upon that I do not found my opinion. The words of the statute are, " that the landlord shall and may bring ejectment ;" and *shall* is imperative. Under the statute of 8 & 9 W. 3, c. 11, an act for the better preventing frivolous and vexatious suits in actions for penalties for nonperformance of covenants, the plaintiff *may* assign as many breaches as he shall think fit. It was at first contended that the statute was not compulsory on the plaintiff to assign breaches, for that the statute was made for his benefit, and therefore he might wave it, and leave the defendant to his remedy in equity : but all the courts in Westminster Hall held it to be compulsory on the plaintiff to assign breaches and assess damages, and the defendant shall not be put to seek relief in equity. This is the fair construction to be put on the statute of the 4th Geo. II, where the words are stronger, being " shall and may ;" and, upon the same principle, if this be the true construction of the statute, and there is no decision to the contrary, then there is an end of the question, for the lease will then have expressed

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no more than that condition which the statute requires. It might not be necessary to express the condition, because the law imposes it. But I will suppose it to be left open to the landlord to proceed in the old way, as before the statute, and a reasonable clause of re-entry is all that the power required, can the adoption of the same condition which the Legislature has adopted in similar cases be considered as unreasonable? The case of *Core v. Day* * has been cited as an authority of the Court of King's Bench that the inserting a condition of re-entry in a lease made under a power in these words, "in case no sufficient distress can be taken on the premises," they not being in the power, was not a good execution of that power. I doubt very much the propriety of that decision; but be that case as it may, it is different in one material feature from the present case. The re-entry required was for nonpayment of the rent reserved by the space of twenty-one days, so that there was a specification of a particular mode, and therefore it perhaps might be inferred no other qualification would be warranted. Here no time is limited: a power of re-entry generally is all that is required; and therefore I think reasonable qualifications may be made.

In this present case, which was only a few years afterwards, the same court thought this power well executed. They must have thought their former decision was wrong, or that this case was distinguishable from it: Lord Ellenborough and Mr. Justice Bayley sat upon both those cases. But whatever may be the construction upon the statute

* 13 East, 118.

of the 4 Geo. 2, I do not rest my opinion upon that. My opinion is founded upon this, that the power of leasing leaves it to the discretion of the lessor to make a reasonable clause; and that the power of re-entry which is contained in this lease is a reasonable one; and therefore I think that the lease is not invalid.

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Graham, B.—In my opinion the demise of the 5th September 1803 is valid. All the directions are strictly observed in the lease, yet how the penner of the lease was enabled to be correct in those reservations but by the aid of the then subsisting or former leases, I cannot readily conceive. But it seems he is mistaken, though with the same guides, in the clause of re-entry for non-payment of rent; for it is said he has unwarrantably and without authority or power, given 15 days respite, and annexed a qualification that no sufficient distress can or may be had on the premises, whereby the arrearages of this 1*l.* half-yearly rent may be fully raised, levied, and paid.

And the question is, whether this lease, with a clause of re-entry so qualified, is a proper and valid execution of the power created by the settlement? Whether it be so or not must depend on these considerations, viz. whether it is substantially conformable to the intention of the creator of the power, suitable and adequate to its object and purpose, and not injurious or inconvenient to the person next in remainder or succession.

I will not trouble your Lordships with cases to show that powers of this kind should receive a liberal

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construction. I ask only the construction of plain common sense: but as these powers pervade the settlements of all the great and potent families of the kingdom, it is important that the execution of them should not be avoided on slight or immaterial departures, even from a prescribed form, still less where no specific form, but a general direction is given. A prudent father, tenant for life, with such a power, makes his leases with the fairest intention; he provides for his wife and younger children by his savings and personal estate; his eldest son succeeds him, and upon an objection of this kind avoids his leases, and the personal estate of the father is exhausted to indemnify the lessees. This consideration would, I may presume, dispose your Lordships not to be rigid in the construction of the execution of these powers, but to give effect to them when they are fairly and honestly executed, and without injury or sensible inconvenience to the remainderman.

What then did the maker of this power mean by the words, "so as there be contained in every such lease a power of re-entry for nonpayment of the rent?" The maker does not say what power—he prescribes no form of the clause. What is it but a general direction to insert a clause of re-entry because of nonpayment of rent, that is, where the rent is not duly paid? This general direction was never intended to be inserted verbally in the future lease; it left the verbal exposition and specific form of the clause to further care and provision; no conveyancer would think of transcribing the terms of this general direction. Besides, "a power of re-entry" for non-

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payment of rent necessarily implies a selection of one out of several. It might be a power of re-entry at common law, or under the statute, or what is likeliest of all, a power such as had been inserted in all former leases of the same subject, and in the very lease which was surrendered to make way for the present. I repeat it therefore, that this general direction necessarily calls for the exercise of judgment in preparing the clause. I speak not of a definitive judgment, that must ultimately rest with a court of law or equity, but of a judgment of the person who executes the power, or his conveyancer, as to what power is meant; the answer to which to me appears obvious, clear, and necessary—a power fit, suited, and adequate to the occasion. Then what is the object and occasion? The coercive means of enforcing the payment of rent: for my error, if it be an error, is this, that clauses of re-entry are intended for that purpose only, and that courts of equity would at no time suffer them to be used for any other purpose; and that if the clause of re-entry in this lease had been unqualified, as it is contended it ought to have been, a court of equity would have enjoined the landlord, on payment of the rent in arrear and costs; so that the remainder-man would not have been at all the better for the unqualified clause. Looking therefore at this general direction as referring to the exercise of some judgment or discretion to be used in the formal execution of this power, let me consider in what manner a tenant for life most anxious to execute it with scrupulous fidelity would act. He would consult his man of the

law. The lawyer reads this general direction, **he** finds he must look into former or subsisting leases, to know first what lands were formerly letten **for** leases; secondly, what the rents were before and **at** the then moment; thirdly, what heriots had **been** heretofore reserved, what duties, what other reservations were to be made and secured. Could **he** forbear, or would he be bound to forbear, to look into the clause for nonpayment of these nominal rents? Were he so bound, I should much regret that the law had established a rule which excluded the very best information he could obtain. But suppose that he must shut his eyes to those clauses in former leases, and in the very subsisting lease of the same lands, he must, in the first instance, consider what is a fit and proper clause for the purpose. He would naturally say, I cannot pen this clause in the language of the settlement; and if I make it without any qualification by a more obvious and easy means of obtaining the rent, I make it a re-entry at common law, with all the inconveniences attending it, and its ultimate control in a court of equity. **He** would therefore conclude that he had better take the statute of the 4th Geo. II, c. 2, for his guide, and pen the clause in the manner which that statute seems to have pointed out on a view of the law and equity applicable to that subject. I cannot be supposed to mean that this first exercise of judgment in preparing a proper clause could ultimately weigh, if in the execution of the power the lawyer had misconstrued its meaning and the intention of the maker; nor can I be supposed to mean that the

validity of the execution of the power could properly be left to a jury ;—the decision on that point could only be by a court of law or equity.

I have said that the clauses for re-entry in the former and subsisting leases were a proper guide to the exercise of discretion in preparing those clauses ; but I say it subject to the doubt which some may entertain ; and if I am not allowed to use that evidence I do not feel that the argument in support of my view of this question is much impaired ; though with that evidence the point is decided. But I take this to be a case very different from *Cooke v. Booth*, which I know has been over-ruled by many subsequent approved decisions. In that case the Court of King's Bench were called upon to put a construction on a written and explicit covenant of no ambiguity, or if any, of a patent ambiguity ; it was a covenant to grant a new lease on the dropping of one of three lives, for the lives of the two remaining, and the third life under the same covenants and covenants. But this is not a question on the language of a written instrument ; it is impossible to contend that it should be literally transcribed into the clause ; it must have some modification : and if you admit any you admit the exercise of common sense and the consideration of the fitness and propriety of the power ; and to my apprehension you admit inquiry as to what clause of re-entry the settler meant. She has bid you look to former leases as to the lands so usually letten, the usual rents, heriots, services, and covenants for their recovery, and for doing suit at the mill ; has she not therefore bid you look for what was the usual

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and proper clause of re-entry for non-payment of those nominal rents? This extrinsic evidence is not resorted to for the purpose of explaining the written and unfolded language of an instrument, but as a guide how to unfold and prepare a future instrument under a general direction, to observe in all particulars what had theretofore been done. That is the substance of all the restrictions; "do as has been done heretofore." But I do not wish to involve the case in this discussion; though for my own part I think the facts found by this special verdict and rightly admitted in evidence decide the question.

As to the question arising on the assumption that the giver of the power meant that the clause of re-entry should be simple and absolute, it is said, with great impression on many, that there is a manifest distinction between a simple power of re-entry, and a power clogged, as it is said, with a condition or troublesome qualification; but the question is not on a difference in terms, but on a difference in substance and effect; a difference which may sensibly injure the remainder-man, not on a difference which leaves him effectually in the same situation, or, as I think, in a situation which may be proved to be better. To judge of this, let me suppose that a clause, such as has been suggested, had been inserted in the present lease; how would it have availed the remainder-man? He must have begun by a demand of his rent of 1 l. at proper time and place. It is hardly necessary to quote Lord Coke's Commentary on Littleton* to show with what punctilious and expensive accu-

* 153 a, 154 a, 201 & 202.

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may this must be done ; the preamble of 4th Geo. 2, sufficiently shows how much those niceties were felt as impediments. He must then with much trouble and expense serve his ejectment, and for a rent arrears of 1 l., and he is immediately met, first by the disgrace of such a proceeding, and then by a bill in equity, with a tender of his 1 l. and costs.

may presume that it was the knowledge and prevalence of this equity that gave occasion to the statute 4th Geo. 2, which empowered the courts of law to exercise the equitable jurisdiction, and provided, on the one hand, an easier remedy for the landlord to enforce the payment of his rent ; and to the tenant a more prompt and less expensive relief, when powers of re-entry were abused. I do not contend that this statute has taken from the landlord his right of reserving to himself a power of re-entry absolute ; but it excludes him from all benefit under the statute if he does not pursue the steps which it points out ; and when a question rises, as here, of a fit and proper power of re-entry for non-payment of rent, what better guide presents itself for the judgment of a man who is to prepare the clause, than the directions of a statute framed in the view of all the legal rights of the landlord, and the equitable relief of the tenant ? And we may remember that when this power was created by the statute of 4 Geo. 2, had passed many years, and its operation was known and prevalent.

I have said, that the giver of this power meant by the words used a power fit, and suited, and adequate to the occasion, that is, to its proper and allowable use, the security and enforce-

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ment of the payment of the rent : and I take it for a clear principle of equity that the landlord shall use it for no other purpose. But two inconveniences are pointed out as affecting the remainderman ; first, that of proving that there was no sufficient distress on the premises ; secondly, the delay and expense of a replevin. The first is applied to an estate for lives, where the rent is merely nominal, and intended only to preserve the relation of landlord and tenant, and the right to future fines. It is almost impossible to suppose property of that kind so dismantled as that the landlord should be put to any difficulty to find a cow, or horse, or piece of furniture, to pay a rent of 1 l. and, with respect to the second difficulty, the same may be said of the improbability of any replevin for so small a rent. But the best answer is, that if the clause of re-entry stand ever so absolute, the tenant, though he would not be heard in equity to say that there was a sufficient distress on the premises, could stay the proceedings at law on payment of the rent and costs ; for I take it that it was always and originally in the jurisdiction of a court of equity to relieve against clauses of re-entry for non-payment of rent, where the tenant was ready to pay the rent, or to give better security if required, for the punctual payment of it, whatever doubts the court of equity might entertain of clauses of re-entry for breaches of other covenants, where it might not be so easy to place the landlord in that situation with regard to his property, which he had a right by all means to secure to himself.

With respect to the cases cited I shall con-

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fine myself to a very few observations on only two, those of *Coxe v. Day*, and *Hotley v. Scot*. With respect to the former, I am reported to have expressed myself too strongly, by saying that it was contrary to law and common sense ; and those expressions have been justly animadverted on by one of my learned brethren. I do not recollect to have used such expressions as applied to that case ; but if in the warmth of argument any such expressions did escape me, I have only to regret that I have been so faithfully reported. This, however, I may say, that from my manner of introducing my own opinion I could not fairly be understood to mean an attack on that authority so unbecoming. I certainly mentioned that case as standing in the way of the present decision, and opposed to it the contrary decision of *Hotley v. Scot*, that in that equipoise of authorities I might more fairly exercise my own judgment ; and I said upon that occasion, what I now repeat, that notwithstanding the imperfect printed report of *Hotley v. Scot*, it is impossible to read Mr. Butler's note, (whatever may be said of his then youth and inexperience), and not to see, that the point of the effect of a qualification similar to the present was distinctly made, argued upon, and over-ruled, Lord Mansfield saying, as I apprehend, with perfect accuracy and truth, that the clause was a reasonable one and conformable to the statute of Geo. 2 ; and that clauses of re-entry for non-payment of rent were in equity considered only as the means of enforcing the payment of it. But, perhaps your Lordships may think the case of *Coxe v. Day* distinguishable from the present. The ob-

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servation of my learned brother, who first delivered his opinion, is material, and in that case there was no reference, nor necessity of reference, to former leases as to what lands should be letten, what ancient rents, what heriots, *suits*, duties, or services should be secured. It was a power to lease *any* of the lands, with the single qualification, that the leases should reserve the best and most improved rents.

The decision of the Court of King's Bench in the present case may be thought to throw some doubt on *Coxe v. Day*; and, all the cases considered, the present is open to your Lordships decision. I humbly offer my opinion, that the lease in question is not, for any reason that I can suggest, an invalid execution of the power.

Richards, C. B. The question arises upon a deed of settlement made on the marriage of Lady Vernon, by which her Ladyship was made tenant for life, with remainder to Lord Vernon, her intended husband, for life, with powers of leasing, which were given to each of them as they should happen to be in possession of the premises. One power is to lease the mineral lands, in which there is no clause of re-entry at all; the power mentioned secondly in the settlement is to grant leases at a rack-rent, with a proviso for re-entry in case the rent be in arrear for twenty-eight days: in that case there is a power of re-entry required in the lease to be granted for non-payment of the rent; but there is an extension of the time from the days fixed for the payment of the rent to twenty-eight days. The clause is to be

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introduced into a lease in which the rent and the occupation run together, and are considered as of the same value, the rent is paid and payable for the year during which the enjoyment of the premises has been had ; yet by the power in that case there is expressly an extension of twenty-eight days given for the payment of the rent. The power now in question authorizes Lord and Lady Vernon, as each of them shall come into possession of the premises, to grant leases of such parts of the land as were then leased for life or lives, so as there be reserved the ancient and accustomed yearly rents, duties and services.

It seems to me impossible to ascertain what lands were then leased for life or lives without looking into the leases and other instruments which were produced at the trial ; and the production of the same instruments is equally necessary to show what the ancient and accustomed yearly rents were. In this view of the case, as it seems to me to be impossible to consider the effect of these powers without looking to the instruments to which I refer, it follows, that in my judgment they were properly admitted in evidence at the trial. Then come the words of the clause in question, viz. “ and so as there be contained in every such lease a power of re-entry for nonpayment of the rent thereby to be reserved.” A more general power can never be expressed : It is not clogged with any qualification ; it requires only a clause of re-entry “ for nonpayment of the rent,” not *on* nonpayment of the rent. There is no allusion to an immediate entry *for* or *on* nonpayment of

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the rent, but a clause of re-entry generally for non-payment of the rent.

Now in this last case, which is the case before your Lordships, the lessee pays the fine contracted for to the tenant for life, the lessor, at once, in the very commencement of the term. The tenant for life receives at that time the whole value of the lease and of the premises demised, except the nominal rent of 2*l.* per annum, and the small duties; and it can hardly be supposed that it could be the intention of the parties to the settlement, in a case where the lessee paid all the value at the first instant, that he should be in a worse condition than the lessee under the other power, paying rack-rent, who was not to pay any rent until he had enjoyed the possession of the premises, and to whom an extension of twenty-eight days beyond the time fixed for the payment of his rent was given.

Now Lord Vernon, intending to execute this power, executed the lease in question, containing a power of re-entry for nonpayment of rent, with this proviso, "that if it shall happen at any time during the said estate hereby granted, that the said yearly rent or sum of 2*l.* and every or any of the duties, services, reservations and payments hereby reserved, or any part thereof shall be behind, unpaid or undone, in part or in all, by the space of fifteen days next over or after any or either of the days or times whereat or whereupon the same ought to be paid, done or performed as aforesaid, and no sufficient distress or distresses can or may be had and taken upon the said premises, whereby the same and all

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Arrearages thereof, if any be, may be fully raised, levied and paid," it shall and may be lawful to and for Lord Vernon, or the person to whom the freehold or inheritance shall belong, to re-enter: and the question before your Lordships is, whether this proviso is agreeable to the power, which directs that in the lease there should be a power of re-entry for nonpayment of rent.

There are two objections stated; the first is, that in the lease the time for the payment of the rent is extended to fifteen days, whereas it is insisted that the re-entry ought to have been immediate, and at the time when the rent was reserved to be payable. The second objection is that the re-entry is given in reference to a want of a sufficient distress.

It is clearly established that the construction of powers is to be governed by the intention of the parties who make them, that intention to be ascertained by a fair interpretation of the language in which the power is worded; in this case, Lord and Lady Vernon, uniting in marriage, may be considered under their settlement as owners of the estates, though before marriage it was her Ladyship's property. By this settlement they propose to grant leases to all who choose to take them upon the terms mentioned in the powers; one of which, relating to the property under consideration, is, that the lease should contain a condition of re-entry for non-payment of rent. It has been considered, and has been ruled in many cases, that in the construction of powers the courts ought to be as liberal as may be; and more liberal in favour of a lessee where the power is executed by the person out of whose

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inheritance the estate issues than when executed by a third person, a stranger. It has been contended, that in this case, the estate moving originally from Lady Vernon, Lord Vernon was to be considered as a stranger, and that there ought therefore to be a greater strictness applied with regard to the lease than if he was originally the owner of the estate; but I beg of your Lordships to observe, that in this case Lord and Lady Vernon had each of them, when in possession, the same power to grant leases; the words of the power are precisely the same as applied to each of them, and must be construed as much to apply to a lease made by Lady Vernon, as to this lease made by Lord Vernon; and therefore they must be construed with the same attention to the meaning as if the words were applied to a lease by one or the other, and we are bound to consider, in construction, the lease in question as if made by Lady Vernon, from whom the estate originally moved, and who may fairly be considered as in a situation similar to the case which I am about to mention, and upon which some of your Lordships can have no doubt. Suppose a landlord seised in fee simple enters into an agreement in writing with a man to grant him a lease for a number of years, with a right of re-entry for non-payment of rent at the time specified: Suppose a bill filed in a court of equity by one or the other of the parties for a specific performance of the agreement, the Court would refer it to a master to settle the terms of the lease; and any gentleman who has ever sat in a court of equity must admit, that the Court will, if applied to, direct the insertion of a power of re-

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entry upon reasonable and usual terms, and unquestionably extend the time of re-entry to a reasonable time beyond the time fixed for payment of the rent ; referring at the same time to a sufficiency or deficiency of distress, as in the present lease. I mention this case of an agreement, because it seems to me to apply very closely to the case before your Lordships. Courts of equity adopt the same principle and practice in hundreds of instances, such as leases by guardians of infants, committees of lunatics, and the like. The Court so acts because it executes the intention of the parties ; and a court of law in construing powers, is equally bound to adopt the intention of the parties creating the power ; and there is no difference in the construction of words in a power, and of words in any other instrument. Suppose Lord Vernon had agreed to grant a lease pursuant to his power, and had not granted it, and there was a bill in equity filed to compel him, or by him, to compel the person who had agreed, to execute the lease according to the power, the court would, I doubt not, direct a lease to be executed with a power of re-entry upon the usual and reasonable terms, which would be according to its construction, according to the intentions of the parties creating the power ; and, I presume, the lease to be executed under the orders of the court would be similar to that which has been executed in this case. I am more willing to refer to the proceedings of a court of equity, because I am speaking in the presence of those who have, perhaps, more knowledge and experience than any persons of the present or any former times.

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I understand from extensive information, and my own experience, such as it is, justifies me in believing that the practice of all conveyancers has been consistent with what I have stated now, so far as the extension of the time is concerned ; and if it be so it certainly must be considered as founded upon the intention which is ascribed to the party making the power, for it is obvious that if the power, as it is contended, required a right of re-entry at the moment the rent was due, the enlargement of the time would be in some degree unjust to the reversioner, as it would cause a postponement of the day of payment: but the practice has been, I believe, so general that it must be strong evidence of the intention ascribed; and so inveterate, that it would be very highly dangerous to affect it: and I have always understood that the Judges have always considered an universal or very general practice amongst conveyancers a sufficient ground for their decisions, though they did not entirely approve of the principles on which the practice had proceeded.

On this point, *viz.* the extension of the time, I have been always inclined to support the lease, and I am of opinion that the objection ought not to prevail.

With respect to the other objection to the lease, *viz.* that a re-entry cannot be had unless no sufficient distress can be had upon the premises, I do not find, from the best inquiry that I have made, that any very general practice or understanding upon the subject, namely, with respect to the execution of powers, has prevailed among conveyancers ; and I have not been able to find that any decision has

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yet taken place by which I am in a judicial point of view bound to abide. I must confess that I was for some time convinced by the reasoning so strongly pressed by some of my learned brothers; and that I formed an opinion on this part of the case agreeable to theirs from whom I am now under the necessity of dissenting; but your Lordships commands have obliged me to re-consider the case, and I feel great consolation in having had the opportunity, as I hope that I have been able, to take a more correct view of the subject.

The objection to the part of the lease with which I am now troubling your Lordships is certainly greatly supported by the inconveniences imposed on the reversioner; but if I am right in deeming the lease good, notwithstanding the extension of the time for the payment of the rent, it must be because it is agreeable to the true intent and meaning of the power, though there are no words that expressly allow that extension. If so, it may be right to presume that the words used in the power meant more than is expressed, and that any right of re-entry on reasonable and usual terms, so far as the extension of the time is concerned, is good. If so, what prevents us from inquiring whether the other terms are reasonable and usual, I mean with respect to the distress; and from holding that if they are usual and reasonable they are within the power? It cannot, I think, be said, that the circumstance of the want of a sufficient distress can be considered as imposing any condition either not reasonable or not usual. Every one's experience shows that in leases in general it is not only usual but most general, and

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it cannot be supposed to be otherwise than reasonable ; and the leases produced in evidence, which I think were properly received, prove the existence of this clause in all of them as applied to the power.

It is observable, however, that the power now under consideration is the first in the settlement ; it requires in very general terms that in every lease pursuant to it there should be a power of re-entry for nonpayment of rent, or because the rent is not paid ; it does not specify any qualification or condition, and only requires that clause of re-entry without more, excepting for non-performance of the covenants. Now it is clear that the clause does contain a power of re-entry for the nonpayment of rent, than which nothing in the world can be more general and unrestricted ; and under words so general I humbly conceive that there is in the lease a clause of re-entry on reasonable and usual terms. In a condition of re-entry all that the law requires is to secure the payment of the rent, and re-entry is, as it were, penal ; and therefore the clause in this lease under the general words of the power is nothing more than what the law would enforce and require, and therefore the clause is exactly agreeable to the power, as it is reasonable and usual.

That the real object of the power of re-entry is to secure the payment of rent is quite obvious ; for a Court of Equity acting on reasonable grounds has always prevented a re-entry from taking place if the rent is paid, though the time of re-entry has arrived ; because it was considered merely as a security for the payment of the rent. The maker of it cannot be supposed in directing the clause of re-entry to

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have intended really to destroy the interest given to the lessee, but to secure the re-payment of the rent reserved to the reversioner : and now by the act Geo. II. the Legislature has given a sanction to the clause which is used here, and directed the effect of it in general. Surely it is very difficult to imagine it is not a reasonable clause, since the Legislature has authorized it in an Act of Parliament made expressly for the purpose of assisting landlords ; and I apprehend that the clause must be considered as agreeable to a power which requires only a clause of re-entry for nonpayment of rents.

I beg here to request your Lordships attention to the observations which I have made on the proceedings of Courts of Equity, which apply to this head as well as to the former ; for I conceive that those courts would direct a clause similar to that which is now in question.

Now suppose this was a lease by Lady Vernon, it seems to me that according to the argument itself used at the bar, there would be very great difficulty in maintaining that the lease was not according to the power, as the estate moved from her ladyship, and therefore the construction of the power would be more favourable to the lessee ; and if the words were the same in the lease she might have made as they are in this lease which Lord Vernon has made, the lease would I think be considered as valid ; and there can be no different construction of the same words, for the construction in both cases must be on the intention ascribed to the parties who used them in the settlement.

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The lessees are purchasers for valuable consideration under the settlement, and upon the faith of the power in the settlement, they have paid the value of the estate for the term demised to them, except the small rent and duties. I am persuaded that every court must feel very desirous of supporting the lease executed. The clause objected to is reasonable, and perfectly calculated to secure the rent. It is inserted in all general leases—it is sanctioned by Parliament—it is, as I conceive, agreeable to the proceedings in Courts of Equity, which act on the intention of parties, collected from the instruments executed by them; it is consistent with all the other leases in the family made under similar powers.

Under these circumstances I confess it appears to me, on the best consideration I have been able to give the case, that this lease is warranted by the words of the power in the settlement, and that the lease is valid.

Dallas, C. J.—I am of opinion that the lease in question is bad, as not being a good execution of the power.

Two objections arise. The first, as to the fifteen days: the second, to the clause providing as to distress: and the case has been argued at the bar, and considered by the learned Judges on the double ground of authority and principle; to each of which I shall separately advert.

And first, as to the fifteen days. The single case cited is of a negative nature; that is, one in which, though other objections were taken, this was

not. And on this case I think a great deal too much stress has been put; for without saying at present whether the objection be well or ill founded, good or bad, intrinsically considered, I will only observe, that when it is seen how it weighs with many learned persons, now that it is taken, it seems to me it is going a great way indeed to assume that if it *had been* taken formerly it could not have succeeded; and, much too far to infer, that its not having been taken is to be considered as proof that by common consent it was treated as not fit to take. The more natural and rational supposition I should apprehend to be that it was not adverted to at the time, at least this is the opinion I should form, for I know not on what legitimate ground of reasoning we can assume that what appears to be so important *now*, was considered and rejected as unfounded *then*. Still, however, let this case weigh as much as it fairly ought it is admitted to be but negative authority; and the question now occurring, and requiring positive decision, it must be examined and determined on authority, if there be authority; and if there be no authority then on principle. Such then is the only case relied upon with respect to the objection applying to the fifteen days.

I come next to the provision as to there being no sufficient distress. And here again, in support of the validity of the lease one case only has been cited, viz. *Hotley v. Scot*, as bearing directly on the point. On this I shall not waste time by dwelling longer than, in this last stage of the discussion, I feel to be necessary; and therefore, as to the imperfection of the report, the character of the re-

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porter as such, the insufficiency and invalidity of the reasoning as reported, and the other grounds of objection made by some of the learned Judges, with whom I agree in opinion, to these I shall merely refer, repeating only for myself what I said upon a former occasion, and am not disposed on reflection to retract, namely, that though the particular point now under consideration was not adverted to then, in the decision, reported as it is, still, as it must have been different if the objection then and now made had been deemed valid, I think that in fairness I must take it, such as it is, to be a case adverse to the opinion I entertain. Taking it then as such, and trying it as authority, the only ground to which at present I am addressing my observations, the first objection to it is that it is a single case, not professing to be grounded on any that had preceded, nor appearing to have been supported by any that had followed it, but on the contrary the only similar case, *Core v. Day*, standing in opposition to it; for as such I consider it, and for reasons which I shall presently give. I need scarcely add that such a case, dissented from as it now is by so many of the learned Judges, admitted to be inconsistent with the decision in *Core v. Day*, and at all events confessedly at variance with the observations and reasoning of Lord Ellenborough throughout the whole of that case, can scarcely, as mere authority, be considered of much avail. In opposition to it, I have said, appears to me to be the case of *Core v. Day*. But here again I wish to deal correctly with the subject of authority; and though to a certain degree (and to what degree I shall examine) *Core v.*

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Day must be permitted to operate, still I think it is not to be relied on strictly as mere authority, even in favour of my view of the subject; first, because if *Hotley v. Scot* was rightly decided, *Core v. Day* would be in opposition to it, and thus we should only have case against case; and further, that with respect to *Core v. Day*, of the learned Judges who now support the judgment of the King's Bench, it is disapproved of by one, as to the grounds on which it stands, and expressly and in terms dissented from by the other; and lastly, because being a decision by the same court by which this case was in the first instance decided, if to be distinguished, as it is contended it is to be, then it does not apply; if not to be distinguished, nothing of authority can result from two cases decided by the same court in opposition to each other.

To dispose, therefore, of the whole subject of authority, it appears to me, that though these cases as cited have afforded much matter for observation and argument, they furnish nothing like authority when correctly considered, and in a judicial sense. A word or two only, before quitting this part of the subject, on what has been much relied on as applied to the objection of the fifteen days, namely, the general prevalence of such leases to be taken as evincing, it is said, the sense of the Profession, and the mischief that will result from now holding the objection good. I allow to these topics their weight, and much weight undoubtedly belongs to them; but if, when strictly examined, the practice proves to have crept in against principle, and is not pretended to depend upon any positive authority, I can only say, that being bound

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to look at the objection now that it is made, I must decide upon principle; and if principle and practice are at variance practice must give way; and in this case, as in others, if the mischief be extensive, the proper remedy, if such there be, must be sought for and applied elsewhere. This however at most confines itself to the objection as to the fifteen days for with respect to the clause of distress, it is not pretended to have any usage or practice in its favour; and the only decided case is directly the other way. And with respect to practice, the extension as to the fifteen days operating, I admit, in proportion to length of time and number of leases, becomes for this very reason, and in the same proportion, stronger against the clause as to distress, inasmuch as in all such leases no such clause is to be found; and my brother Holroyd, to whose labour of research and solidity of learning we are all of us, at all times, so much indebted, has informed your Lordships, that on an accurate research he has not been able to find in the books of precedents beyond one instance of such a lease, and that not appearing to be adopted in common use. Practice is therefore not only wanting in its favour, but practice is the other way; and in this respect practice and decision go hand in hand.

I come now to consider the case on principle. And first, I admit, that if the power is to be deemed indefinite as to time, and therefore to be exercised in a reasonable manner, leaving it to the discretion of the party by whom it is to be executed to decide what is reasonable, it does not appear to me that the giving fifteen days in the way in which they are

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given can be considered as unreasonable. In truth, I deem it quite immaterial to any real interest of the parties, or as to any substantial effect, whether 20s. are to be paid by the one and received by the other fifteen days sooner or later; and so I apprehend the party might have thought had his attention been drawn to the point. But when I am told of what the party really intended, as of an independent and substantive intention, collateral to the instrument itself, pre-existent, and having caused the power to be framed precisely as it is, I can only say I take the probability to be, if we could look to the mere matter of fact, that the party himself never entertained a precise intention of any sort on the occasion. The substantial purposes were to be accomplished; the detail of execution was of course left to others; and this may account for the difficulty that has arisen. Drawn as the power is, it was probably supposed by professional persons that the former leases might be looked at, and the clause in question being found there was adopted, and I agree reasonably adopted, if such leases were to govern or might govern; but whether so or not is one of the questions in this cause, and which, if decided in the affirmative, would support the lease as far as this objection goes, though, decided the other way, the case will still depend on the other general grounds, and the lease may notwithstanding be valid. Fifteen days therefore, if time might be given, I should consider as not unreasonably given.

In like manner as to the clause of distress, I see no actual injury as likely to result from it in this particular case. I agree with several of the learned

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Judges that it is not likely that 20s. of half-yearly rent would be suffered, if demanded, to remain in arrear; or if in arrear, that in the case of leases upon fines a distress to the value of 20s. would not be found. But this is a way of trying the question precluded by the very nature of the question itself. The providing for a particular event not only pre-supposes the possibility but even the actual occurrence of such event; it pre-supposes to provide for it; it anticipates and adapts itself to it.

The question therefore arises on what the parties have said and done, not on the reasonableness of doing it, or on the sufficiency or insufficiency, the weight and value, which we are not at liberty to consider; and therefore without looking out of the instrument, but to the instrument, and searching in it for the intent to be collected from what is there expressed, if sufficiently expressed, in other words, treating the question as your Lordships desire us to treat it, that is, as a question of construction arising on the instrument such as it is,—what is the legal effect of the lease compared with the power?

And first, to look to the power, (agreeing, as I do, that the intention of the party must govern,) as to be collected from the whole instrument. It directs a clause of re-entry for nonpayment of rent, and this merely; nothing is said as to time, nothing as to distress; nothing as to reasonable, nothing as to usual; nothing that refers to any former lease or leases in any way whatever, so as to furnish a rule, though reasonable and usual, ancient and accustomed, are terms to be found as words of reference in several parts of the instrument, directly connecting

themselves with former leases and for various objects and purposes.

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First then as to time. That time may be as properly fixed by the occurrence of an event as by the express specification of time can scarcely be denied; and when rent is made payable on a particular day, connected with a clause of re-entry for rent not paid, I can only understand not paid on the day when payable. In this there is nothing ambiguous, nothing deficient, nothing to be implied to complete what is expressed. Nor has it been argued, that if the lease had been drawn in the very terms of the power it would not have been a proper execution of the power. But it is said in the same instrument twenty-eight days are given for payment on the leases at rack-rent, being a substantial and heavy rent, before forfeiture can attach for nonpayment; and it is argued,—Could the party intend a provision so preposterous and harsh as that forfeiture should become the immediate consequence of a half-yearly rent of 20 s. falling into arrear? To which I answer, that this suggestion of harshness appears to me to be imagination, and nothing more; for what of real harshness is there in making an estate liable to forfeiture upon nonpayment of a sum so small, as from its very smallness not to require time to be given to pay it? Fifteen days were scarcely necessary to put a party into condition to pay 20 s.! And further, why the party to receive could not judge if time were to be given as to the fifteen days as well as to the twenty-eight, I am altogether at a loss to conceive. If at liberty, therefore, to conjecture as to intent, independent of the words made

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use of, my conjecture would be, that the party himself meant nothing as to the fifteen days beyond what he has said; that he meant only what he has said, and still less, if possible. Can I suppose that he actually meant time to be given, intentionally avoiding to decide what that time should be, and this merely to leave it open to the discretion of another to decide for him what he could just as well have decided for himself? In the particular case time may be of no moment any way; but as applying to future cases, and involving principles applicable to the construction of all instruments, it becomes of real magnitude and importance. It is not in the operation of the clause, as it applies to the lease, treated as a valid lease, that any difficulty arises, but in the application of the lease to the power, with a view to the validity of the lease.

But I go farther, and will suppose the question to be, whether the power should not be so construed as to imply a reasonable discretion to have been intended as to time. In such event, it has been asked who is to construe what would be reasonable time? Now, passing by all the difficulties that may arise in this respect, I am willing to answer—the competent tribunal according to the nature of the case. But which, according to the case, is the competent tribunal? This becomes a question. On the trial of this ejectment was it the Jury or the Judge? and though, in the result, which of the two might be ascertained, yet the result could only be got at through, as now, a doubtful controversy; and this uncertainty as to tribunal, with the additional uncertainty as to result, that result depending on the un-

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uncertainty of opinion, which may be different with different men, and of which these proceedings have in every stage afforded ample proof, and, this day in particular, a striking instance, are all inconveniences introduced by holding the power to be indefinite, and would have been avoided by framing the lease in the words of the power. One way it would be certain; the other opens at least to question; and it is this substitution of uncertainty for certainty, this rule of discretion, which throws open the gate to litigation, that would otherwise be closed and fastened against it, that constitutes my fundamental objection so to understand and so to construe this power. If therefore the question be, whether reasonable or not should be implied, I should hold that it ought not to be implied, even if we were at liberty to imply it, framed as the power is.

I come now to the second objection; and though in one light it is the most material, yet it will not be necessary in this late stage of the proceedings to discuss it at any length; I mean restraining the right to re-enter to there being no sufficient distress to be found on the premises. And with respect to this, all I have hitherto said as to time applies with increase of force. It is a further clog, not warranted by the original power, and it is one which, as to possible injury, does not rest in speculation merely. The case so often referred to in the Exchequer forms a practical comment. When resorted to as a remedy it shows the wrong which may result. The lessor of the plaintiff failed because some obscure corner of the premises had not been searched. That case is this; and in a similar proceeding the effect would

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have been or would be the same. To the validity of this objection *Coze v. Day* is in point. It is so, I conceive, in the decision; it is so beyond all doubt, as I apprehend, from what is said by Lord Ellenborough throughout the whole case. Whether to be fairly distinguished or not, in any respect, I have already examined, and will not repeat. The argument drawn from the statute, and the general nature of such a clause considered as a mere security for rent, was brought forward then, as now, but was mentioned only to be over-ruled, the point not appearing to the Court to be sufficiently tenable to admit of discussion.

To one or two other points I shall now barely advert. I can scarcely think that the question can be reduced to one of mere verbal consideration. But if so, I cannot myself feel the difference between "on" and "for;" "*for* nonpayment of rent," I consider to be equivalent to "*on* non-payment of rent;" though I have no hesitation in admitting that "on" and "for" may be sometimes different and sometimes synonymous, and this depending on the context and the subject-matter. But looking at the subject-matter, and taking the whole of this instrument into consideration, I think there is no reason for distinguishing on the present occasion. In like manner, as to the term "beneficial," I conceive it to refer to the lessor or the remainderman, and not to the lessee; and so understood, if there be any weight in the observations I have hitherto made, such a reservation would be less beneficial to the lessor than the direct clause unclogged with any conditions as to time or distress.

Taking, further, the words of the power to apply to former reservations, and that with this view former leases might be looked at, it seems to me the argument turns the other way. The power directs that there be reserved the ancient and accustomed rents, or as great or beneficial rents, duties, and services, thereby letting in, I admit, the former leases as evidence of what rent was ancient and accustomed; and so as to duties and services; but following up these general words with special and particular words, showing the powers were not intended to include the clause as to re-entry, particular words specially providing for this right, and in terms directing how it shall be reserved: and having mentioned former leases as admissible in these respects, I will only further say I think they were not admissible, except for the purposes as to which they expressly, or by necessary implication, refer. This is indeed a necessary consequence of all I have already said, and without therefore going at large into the wide field which the argument in this respect has occupied, but referring generally to the opinions and reasoning of those who think as I do, I will merely state the broad ground of my opinion, which is, that there being no ambiguity of any kind, nor any words of reference to any other or former leases as connected with this subject, nor any generality of expression, so as to let in extrinsic evidence to restrain or qualify or to exclude, but a clear, specific, and definite sense and meaning, such evidence is not admissible. This conclusion, it will be admitted, must follow if the premises are well founded, but whether so or not

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depends, as far as my opinion goes, on the validity of the general grounds on which that opinion rests, and of which it is for your Lordships to judge.

Abbott, C. J.—I am of opinion that the demise of the 5th September 1803, is not invalid.

The objection upon which it is now sought to avoid the lease is, that the clause of re-entry for nonpayment of the rent is not such as is required by the settlement; and this for two reasons. First, because it allows to the tenant fifteen days for payment beyond the days mentioned in the lease; and secondly, because it is restricted to instances wherein no sufficient distress or distresses can or may be had or taken upon the premises, whereby the same, and all arrearages thereof, if any be, may be fully raised, levied, and paid.

This objection is *strictissimi juris*, and as such is by no means to be favoured; though if the *strictissimum jus* be found upon due consideration to be with the objector a court of law is bound to yield to his objection. As I have already intimated I think the right is not with the objector.

In the course of the argument your Lordships attention was called to a supposed distinction in the construction of powers, between such as are created by the owner of the inheritance limiting a partial estate to himself, and to be exercised by himself as owner of such partial estate, and such as are created by the owner of the inheritance to be exercised by a stranger, to whom he may have limited a partial estate, or to whom he may have given the power as

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a naked power, unconnected with any estate in the land. Such a distinction appears inapplicable to the present case, because the owner of the inheritance has here limited a partial estate, first to a stranger, and secondly to herself; and the words of the power must have the same meaning, whether the question had arisen upon an execution thereof by the stranger or by herself.

It was also argued, that the power of leasing being for the benefit of the tenant for life, the qualifications and restrictions imposed upon the exercise of the power are for the benefit of the remainder-man; and therefore that the clauses of qualification and restriction are to be construed most beneficially for the latter. This point also appears to have little weight in the present case; because, adverting to the amount of the fine paid upon the surrender of an existing lease, and to the amount of the rent reserved, I think it cannot be supposed that the purchaser of the present lease would have given one farthing less if the clause of re-entry had been strictly confined to nonpayment of the rent at the very day; or that the estate of the remainder-man would now be worth one farthing more if the lease in question had contained a clause to that effect, instead of the clause upon which these objections have arisen.

And being of opinion that the tenant for life could derive no benefit, and that the remainder-man sustains no prejudice as to the value of his interest, from the form in which the clause of re-entry is found in this lease, I think a court of law may reasonably regard the interest of the tenant, *the purchaser of the lease*, and put such a reasonable and liberal con-

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struction upon the words of the power in the settlement as will give effect to the lease, rather than yield to critical forms and subtle objections adduced for the purpose of defeating it. And this becomes the more important, if it be true, as has been suggested, that very many leases are in existence containing clauses similar to the present, and demised from powers expressed in language similar to that of the power from which this lease was derived. Considerations of this nature certainly ought not to control or vary the sense of plain and unambiguous words ; but they may be reasonably entertained for the construction of words of doubtful import ; not merely by reason of the consequences of a decision in a particular case affecting numerous other cases of the like nature, but because the fact suggested is evidence of the general opinion entertained by professional men upon the meaning of the words of a legal instrument.

These words, in the present case, are “ a power of re-entry for nonpayment of the rent to be thereby reserved.” And the first question is, whether these words may be understood to mean a reasonable power, or must be confined to a power which the landlord may exercise if the rent be not paid at the very day, and without regard to any property to be found on the demised premises, upon which he may levy his rent, and thereby compensate himself at his tenant’s expense for his tenant’s neglect.

If the words may be understood to mean a reasonable power, the only remaining question will be, whether the power of re-entry contained in this

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It shall be a reasonable power. I shall proceed in the first place to show, that in my opinion the words in question may be understood to mean a reasonable power. Nonpayment is a mere neglect or default, and if the words "a power of re-entry for nonpayment of the rent" are to be taken strictly and *ad literam*, they will import a power of re-entry for the mere neglect or default of the tenant; but this cannot possibly be their legal import or effect, because by the common law of England a landlord never could enter for the mere neglect or default of his tenant in this respect under any power or clause in whatsoever language expressed. Some act is always required to be done by the landlord in order to entitle himself to exercise his power, and this is required to prevent the tenant from being surprized or injured. This act at the common law was an actual demand of the rent on the part of the landlord. And the common law required this demand to be in a most precise and peculiar manner. It was to be made just at the close of the last day of payment (allowing the tenant the whole day to prepare his money) at the time when so much day-light remained as might be sufficient to view and count the money, and no more. It was to be made at the door of the demised messuage, if any on the premises, and if none, then at such usual and notorious place of resort where the tenant might reasonably be expected to be found, if he was not altogether absent; and it was to be of the precise sum then accruing due, not including any former arrears, all of which, although due and recoverable by distress or action, were considered as waved by the landlord

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on a question of forfeiture by his prior neglect to demand or enter for them.

Then if the words of the power, or rather of the qualification of the power contained in the settlement, cannot receive a literal construction, and be held to apply to a case of neglect or default only according to their literal purport, they must receive some other and different construction, which must in my opinion be a reasonable construction, and a construction properly suited to the object and purpose in view; that is, to secure and enforce the payment of the rent, so that on the one hand the tenant may not hold the land without payment to the prejudice of the landlord, nor on the other hand, be dispossessed of it, if either himself or the land, which is emphatically said to be debtor for rent, presents payment, or the means of payment, without unreasonable delay or prejudice to the landlord.

It has been objected however, that if the literal or strict meaning of the words be not adopted no other meaning can be, because, as it was said, courts of law cannot say what is a reasonable power or clause of re-entry. But I conceive that in this as in all other cases courts of law can find out what is reasonable, and that in some cases they are absolutely required to do so. In many cases of a general nature or prevailing usage the Judges may be able to decide the point of themselves; in others, which may depend upon particular facts and circumstances, the assistance of a jury may be requisite, and wherever such assistance is requisite there are ready modes of obtaining it. I will mention one instance in which courts of law are required by the Legislature

to discover and decide, if the point be litigated, a question upon the reasonable execution of a power.

By the general inclosure act * a rector or vicar is enabled to lease his allotment under certain restrictions mentioned in the act, and among others, so that there be inserted in the lease, “ power of re-entry on nonpayment of the rent or rents to be thereby reserved within a reasonable time to be therein limited after the same shall become due.”

A lease of such an allotment must therefore provide, that if the rent be unpaid for some specified number of days or weeks after the day of reservation, the rector or vicar may re-enter; and if any question should arise, whether the number of days specified in a particular lease be or be not a reasonable time, the courts of law must necessarily find some mode of deciding the question.

For these reasons I am of opinion that the words of the clause in question may and ought to be understood to mean a reasonable power of re-entry. And taking this to be the legitimate meaning of the words, I proceed to show that in my opinion the power of re-entry contained in the particular instance of the lease in question is a reasonable power. Usage is of great weight in considering what is reasonable; and it cannot be denied that the power of re-entry, as expressed in this lease, is in form and substance such as was frequently found in leases before the execution of the settlement by Louisa Barbara Mansel, which was in 1757. This is a fact which must be in the knowledge of some of your Lordships, without recurring to the special verdict

* 41 Geo. III. c. 109. s. 38.

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for information as to the leases of this particular estate. If any space of time could be allowed beyond the days of payment prescribed in the reservation, the space of fifteen days, which is the period allowed in the present lease, will not I am persuaded be thought an unreasonable space of time. Indeed, although this objection was pointed out, it was not so much insisted upon, nor could be in the construction of a settlement allowing twenty-eight days for payment in leases to be made at a rack-rent. The main stress of the argument was applied to that part of the clause in the lease which narrows the power of re-entry to cases wherein no sufficient distress can or may be had and taken upon the premises, whereby the rents and services, and all arrearages thereof, may be fully raised, levied, and paid.

Upon this part of the argument the case of *Core v. Day* * was quoted and relied upon. It has however been discovered that the decision in that case is contrary to a prior decision of the Court of King's Bench in a case of *Holley v. Scot*, reported in Lofft, and of which a more correct manuscript note was also cited. This earlier case was unknown to the counsel by whom *Core v. Day* was argued, and probably to the Court also; so that the decision of *Core v. Day* is not wholly free from question as to its own particular circumstances. It was certainly not thought applicable to the present case by the two surviving Judges of the Court when the present case was before them; and it is distinguishable from this by the difference of the language of the clause

* 13 East, 118.

in which it arose. For in that case the words of the clause were not general, as in the present, "power of re-entry for nonpayment of the rent," but special, "a power of re-entry, if the rent be behind for the space of twenty-one days," which words do not so easily admit the introduction of any other qualification or matter as the general words of the present clause; so that upon the whole the case *Core v. Day* does not appear to contain a decision precisely in point to the present case. And therefore in respect of authority the question still appears to be left open,—whether in the absence of any words denoting a contrary intention in the mind of the framer of the clause, a restriction of the right of power of re-entry to the absence of a sufficient distress be a reasonable restriction in a lease like the present; for if it be, then a right or power so retained is a reasonable right or power of re-entry, and the introduction of such a right or power into the present lease is a good execution of the leasing power contained in the settlement.

Such a restriction of the right had prevailed in practice before the execution of this settlement in 1757. It was known and in use, though probably less general or frequent before passing the statute 4 Geo. II.* in 1731. If the effect of that statute be (at least one very learned person has thought) to alter entirely the common law, and to take away the right of re-entry under any circumstances of demand and refusal of the rent, where a sufficient distress can be found, then certainly the express introduction of the words of restriction cannot invalidate the lease,

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* C. 28, s. 2.

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because it is only an expression of a matter tacitly contained and implied by operation of law. But supposing the statute not to have this effect, still in my opinion the restriction is reasonable in itself in a case like the present. The instances of proceeding at the common law by demand of the rent since the statute was passed are very few ; the proceeding is in itself troublesome and difficult, as will appear by the circumstances required, which I have already mentioned ; it was indeed so troublesome and difficult, and found to be attended with so little benefit to landlords, that the statute was passed for their relief, substituting the absence of distress in the place of demand. Can it then be said that the reversioner is unreasonably restrained or prejudiced by the introduction of a matter which the Legislature has thought generally beneficial to landlords, and which in all probability he himself would have adopted, even if the terms of the lease had been such as to have allowed him to act otherwise ? I say that in all probability he would have adopted it, because I presume his only wish, like that of every other reasonable person, must be to obtain the payment of his rent in the most easy and speedy manner. And whatever difficulty there may be in viewing a messuage or farm, so as to ascertain whether sufficient be found upon it to answer the arrears of a rent, bearing, as in this case, a very small proportion to the annual value of the tenement, still I have the authority of the Legislature, and of the experience upon which the statute was founded, for saying that this difficulty is less in practice than the difficulty of making such a demand as would authorize a re-entry

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at the common law. If any thing more be desired by the reversioner than a speedy and easy mode of securing and enforcing the payment of the reserved rent, I should say that he desires more than the framer of the settlement intended to give, and more than the law ought reasonably to allow. The power of re-entry, in whatever words it be expressed, can be exercised only in one of two modes; that is, either by making a demand at the common law, without regarding the value of distrainable goods on the premises, or by ascertaining that no sufficient goods are to be found on the premises, without regarding a demand of payment. For the reasons already given I think the latter must be considered as the most effectual and beneficial mode, and therefore, speaking generally of cases of this nature, I can discover no reason for resorting to the former, except a hope (certainly not entertained in this particular case) that the tenant, being taken by surprise, and not expecting a demand, may not be prepared for immediate payment of money, and a desire to take advantage of his want of preparation and deprive him of the residue of his term or harass him with a law-suit. To such a motive a court of law will never lend its aid. And a construction calculated to give effect to such a motive would be contrary to the general principles of the law. And it ought not to be omitted that the present question arises upon the construction of that part of a leasing power which is intended to create a forfeiture of the lease executed under the power. It is said in our books that forfeitures are odious in the law, and this is the reason assigned for requiring so much formality and

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precision in the demand of the rent at the common law. And for the same reason, in addition to all others, I think such a construction ought to be put upon the words of the settlement as will tend rather to the exclusion than to the introduction of forfeiture of the leases to be granted under it.

For these reasons I am of opinion that the demise of the 5th September, 1803, is not invalid.

The Lord Chancellor.—The question which is now brought before your Lordships for decision is undoubtedly a question of very great importance to the parties. We have to determine upon the validity of a particular lease, which is stated in the special verdict. The decision upon that lease however will not only give validity or invalidity with respect to the lease in question, but, as we have been informed upon the argument at the bar, will give validity or invalidity to the leases of a very considerable property. The plaintiff therefore has a great interest in your decision. The tenants of course have a very considerable interest in your decision; but the interest in your decision is not confined to the landlord and the tenants in this case, because I apprehend that if these leases are invalid, the tenants in this case, probably, as in a case from another part of the united kingdom, I mean the case of the Queensberry leases*, will have a title to recover against the assets of the deceased lessor the value of the interest in the lease, if the decision should be against the validity; but however great the interest of any of these parties may be, it is most for the

* *Ante*, Vol. 2, p.

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Core v. Day. If *Core v. Day* is an authority one way, *Hotley v. Scot* is an authority the other way; and the judgment of two of the Judges in the court below on this very case conflicts with the case of *Core v. Day*. But such have been the habits of my professional life that I cannot think that we have attended to all the authority which deserves consideration. That the practice of conveyancers amounts to a very considerable authority on this subject I am justified in saying, by the opinions of the greatest lawyers in Westminster Hall, who I am persuaded, in many instances, would have come to a different decision from that which they thought proper to adopt, if they had not taken notice of the practice of conveyancers. But upon this subject I take the liberty, with very great respect, to intimate an opinion, that upon cases of this nature it might not be much amiss if courts of law would inquire a little more what has been done in courts of equity, for the purpose of knowing how far Judges who have sat in courts of equity have determined the legal point before they have applied themselves to those directions, and decrees, and orders which they are daily in the habit of pronouncing. Between the year 1772 and a period approaching the year 1780, I spent many of the most profitable years of my life in the office of a conveyancer, and I was led at that time to a knowledge not only of the practice, but of what were the sentiments of the great conveyancers of those days; and I am sure it never would have occurred to any one of them, if there was a leasing power in any marriage settlement requiring such a power as this.

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case the trustees of the inheritance are called on to make leases, and in most of those settlements there is no mention of the period of forbearance which shall be given ; some do, but there is an infinite majority which do not mention any days at all. I venture to say this as matter of my own knowledge. The practice as to leases made by such trustees would, I say, of itself form a weighty consideration here ; but in leases of that kind, made under such powers by the authority of the Court of Chancery, you must permit me, for my predecessors and successors, though not for myself, to say, in every one of those cases there is an authority of law that that is a due execution of the power, because the Chancellor has no right to direct such a lease to be made, if when it is executed it is not according to the power ; he is a judge of law and equity, and when he has determined as a judge of law that such is a due execution of the power, then and then only has he authority, according to the constitution of this country, to direct any such trustees to make such leases. I should be glad then to know whether the constant practice of that court is not to be looked at as a practice fixing what is the legal construction of such a power to lease.

It does not rest there ; for in the case put by one learned Judge, suppose the tenant for life here had agreed with this occupying tenant to make him a lease, with a power of re-entry giving such an extension of time, and then the tenant had filed a bill in equity to compel him to make a lease according to the agreement. No Chancellor could possibly have directed a lease to be made with fifteen days time in case of a nonpayment of rent, unless he was satisfied

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according to the limitations of the settlement of that land in respect of which they are made. What is the consequence? The consequence is, that the power of leasing in the settlements under which those respective persons (lay persons, not ecclesiastical persons) are made tenants for life, apply themselves to the whole of the lands after the allotment is made ; and a most singular thing it would be to say that fourteen or fifteen days is a reasonable time for a power of re-entry for a parson or vicar, but a direct breach of all that is reasonable with respect to the tenant for life claiming under a settlement, which settlement has a new object to operate upon in the allotment made under that very act of inclosure. I say therefore, as to this case, that if it does not stand on peculiarities in this settlement, there is a weighty authority to be found in practice of long endurance, which I will venture to say would make your decision one of the most mischievous that ever was pronounced in this House, if you were to decide against such practice.

But I think we may lay out of the question the authority of practice. I proceed to comment upon the terms of this settlement, taking it for granted that it is understood on all sides that this special verdict completely finds every thing that ought to be found. I put that upon the understanding of the parties. We have had in the course of argument at the bar a great deal of discussion upon the admissibility of extrinsic evidence. Now, with reference to extrinsic evidence, my humble opinion is, that this is a case in which you must admit some extrinsic evidence ; you ought not to admit

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what the meaning of that power is. I say also, that if the instrument in which the power is contained shows what was the nature of the estates that the persons had who were making that settlement in which the power of leasing is contained, you cannot shut your eyes against that part of the instrument which shows what was the nature of the estates.

With these general observations I call your attention to what this case is. A lady, named Louisa Barbara Mansel, afterwards Louisa Barbara Vernon, was tenant for life of the estates, with several remainders over. The will under which she claimed as tenant contained a power to her in consideration of marriage, either before or after marriage, of revocation and appointment, as afterwards pursued by her in the deed of settlement. The special verdict states, that upon the 20th of July 1757 she intermarried with Mr. Vernon; that before the marriage, upon the 2d of July 1757, she by her deed revoked the uses and devises contained in the said will concerning the said premises, and appointed and limited the same to Francis Earl of Guildford, and Charles Montague, and their heirs, in trust, to hold the same to the same uses as before limited, until after the said marriage, and then to the uses of the said George Venables Vernon for life, without impeachment of waste, remainder to the said Louisa Barbara for life, without impeachment of waste, and in the mean time to the said Francis Earl of Guildford, and Charles Montague, and their heirs, to preserve contingent remainders, and to permit the said George, during his life, and afterwards the said Louisa Barbara, during her life, to

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take the rents, &c., and after the decease of the survivor of them, to divers other uses for the benefit of their issue, and in default of issue to the use of the will of the said Louisa Barbara, and subject to the powers and limitations to be thereby directed and appointed, and in the mean time to the use of the said Louisa Barbara, her heirs and assigns for ever. And then follows the clause upon which this question principally arises.

Before I state that clause I will mention another head of authority, which I confess has disturbed me a good deal with respect to these fifteen days. By a statute * made some years ago the Legislature empowered the committees of lunatics, by authority of the Court of Chancery, where those lunatics were tenants for life, with powers of leasing, to make such leases as the tenants would have made if they had been of sane mind; and I never had the least doubt, in consequence of the habits of my professional life, in directing them to make leases with this ordinary reservation of fourteen or fifteen days, with respect to the time of forfeiting the estate. I certainly did, however, think it right, in deference to the opinions which I understood had been stated in the Exchequer Chamber, to check myself in that practice, and to take care that that habit should no longer be acted on. So, if a parson or vicar should be a lunatic, who had an allotment under an inclosure act, and it should become necessary for the Court to act, I should have directed the execution of the power in a similar manner.

Where a power of this sort is given in a mar-

* 43 Geo. 3, c. 75, § 3 and 4.

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riage-settlement it is part of the contract which all the parties in the marriage-settlement are understood to enter into with respect to each other; it is for that reason to be construed in questions between the parties to the settlement and those taking under it according to the intention of the parties. In a question, between a landlord for the time being and a tenant, I apprehend the landlord for the time being is to be considered, in an instrument of this kind, as acting on the behalf of all the parties who have interest in the inheritance of the estate; and that therefore there must be that *bona fides* on his part with respect to the tenants which would be required in other cases, and upon a question of forfeiture, if the parties really are dealing *bonâ fide* according to what they conceive to be the intention of the parties, (not misconceiving that intention, which would vitiate the lease;) but if a fair construction will authorize you to say they have not misconceived it, you are not to look *astutely* to defeat it.

In this case there were three species of estates of which leases were to be made; one of these estates, as I understand, usually demised for lives upon payment of a fine, which payment of a fine is in truth a great portion of the consideration which is paid for such leases; and the small annual rents and other services, though of some value positively speaking, are of little value compared with that other part of the consideration; they are a sort of rental, which is rather from time to time calculating a small sum of money off the value, than paying any part of the value of the estate. The next species of lands are lands to

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be let at rack-rent for years absolute, and with reference to them it is very easy to reserve a power of re-entry: and the third is of mines; with regard to which, unless conveyancers are more able at this time of day than some of the old ones used to be in the last century, it would be difficult to find out what sort of power of re-entry you could apply to it; they are therefore in general obliged to content themselves with alluding to proper and reasonable modes of working the mines.

The condition to which we are particularly to attend is this; “and so as there be contained in every
“ such respective lease, demise, or grant; and so as
“ on every such respective lease, demise, or grant for
“ a life or lives, or for years determinable on the
“ dropping of a life or lives, there be reserved and
“ made payable, during the continuance of the estates
“ and interests thereby to be demised, leased or
“ granted respectively, the ancient and accustomed
“ yearly rents, duties, and services, or more, or as great
“ or beneficial rents, duties, and services, or more,
“ as now are, or at the time of demising or granting
“ the premises so to be demised, leased, or granted
“ respectively, were reserved or made payable for
“ or in respect of the same premises respectively,
“ or a just proportion of such ancient or the pre-
“ sent reserved rents, duties, and services, or more,
“ according to the value of the premises so to be
“ demised, leased, or granted respectively;” and then come the exceptions with respect to the heriots, and the usual clause, that these were to be for the benefit of the persons entitled from time to time.

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Now, let us suppose ourselves sitting down to make a new lease of these premises after the year 1757, of premises which in the year 1757 were held under a then existing lease, addressing ourselves to the execution of that power. Is it possible to deny, that in order to see how the power is to be executed you must look at that existing lease which is the lease immediately preceding that which you are to execute? I do not carry it farther; I do not enter into the question whether you are to go back into the more remote periods of time and see what was the habit in all times past; but I say you are bound to receive the evidence to which the language of the power refers you; and you are bound to receive the evidence of the deed containing the power. If you mean to demise the lands according to the ancient and accustomed rent you must go to former leases to know what it is; so as to the duties and services. It is not necessary they should be the same yearly rents, duties, and services, or more, but they may be as great *or* beneficial rents. I have no difficulty in saying, that under this clause you might reserve as *great* a rent, or as *beneficial* rents. I have a right to look at this word “or” as being of some signification. I find in other parts of the lease as great *and* beneficial. This is to be as great *or* beneficial; and I cannot help expressing the opinion, that I entertain a very considerable doubt whether, if this clause as to the distress had not been contained in the new lease, the new lease for that reason would not have been bad.

If it be argued, that demising for a rent of 24

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and instead of reserving a power of re-entry for the nonpayment of the rent, in the sense which has been put on the words, reserving a power of re-entry on nonpayment of the rent for fifteen days, that you thereby affect, though in a small degree (and I agree entirely with what the Lord Chief Justice says, that it is not the degree, if you affect) the principle on which you ought to act; I answer if this power authorizes me to make a lease, provided the rent is as beneficial, if I demise upon the same rent, in the same way, do not I reserve as beneficial a rent as formerly. The stress laid on these words would go a great way to convince those who consider what the case would have been if there had been no such words; the former leases having that power of re-entry for nonpayment of rent, would not this power have been the same in construction whether those words formed part of the instrument or not, because without that power of re-entry the rent would not be so beneficial as under the former leases.

Then, come these words, and let us suppose that they are necessary; "and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved;" and this occurs in an instrument, where with respect to property upon which the best and most improved yearly rent was to be reserved, and where, with respect to that rent which was to be so reserved a rent which was *de anno in annum*, and from half year to half year, rendering to the landlord the value of the enjoyment for those periods by the

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tenant, the authors of this settlement say that in such a case as that there shall be nonpayment allowed for twenty-eight days.

I take it now upon the first objection as to the fifteen days ; and I should be very glad to ask whether a power of re-entry for nonpayment of rent in fifteen days is not a power of re-entry for nonpayment of rent ? No man can deny to me that it is a power of re-entry ; no man can deny that it is a power of re-entry for nonpayment of rent. It is not the same power as it would be if it was twenty days, or twenty-five days, but still it is a power of re-entry for nonpayment of rent ; and where are the words on which the parties insist there shall be an unconditional power of re-entry for nonpayment of rent. They have said no such thing.

Now, to recur again to the impression that old habits make on one's mind, it would have appeared to me, previous to the agitation of this case, one of the most astonishing things, having had a good deal to do with decisions at law, that where powers are so generally expressed as to leave it in the party to say this is a power of re-entry for nonpayment of rent, that these words generally expressed, considering the practice, are to be an actual execution of the power : it would be most astonishing to me, that if there was a lease to be made, the lessor could insist it should be no lease, but a lease giving a power of re-entry at the day. I should say that was contrary to the habit and usage of a Court of Equity. Speaking from that

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habit and usage, the language of the law, before it made any order or decree, the Court ought to decree in favour of the tenant if he were willing to execute a lease upon a reasonable period of days for the nonpayment of the rent; and I cannot help thinking that from the circumstance of pointing out the twenty-eight days in the other case, you are bound to see a difference between the reservation of a rent which is the actual value from year to year, of the land that is occupied, (as far as a tenant ever pays the actual value;) and where a tenant pays a great fine. It does appear to me that this deed affords sufficient evidence, particularly with reference to the words I have before commented on, that if the rent was as beneficially reserved as in the existing lease, that it is a due execution of the power unquestionably.

But that does not touch the question about distress, I admit, save as it touches the question if the same qualification of distress was in the former lease; because if the same qualification of distress was in the former lease, then the same arguments that you build on giving the period in the former lease applies to giving the distress; but if this means a reasonable power of re-entry, and if that has been the construction usually put on it, it is the same as if the lease was directly conformable to the power. The practice has applied that quality to the reservation of a power; and I know no difference between determining what is reasonable with reference to that object, and what is reasonable as applied to the other objects: when you speak of a reason-

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able rent, that means the *quantum* of rent; but a reasonable power admits of different considerations.

I might stop there, because though I cannot agree with the learned Judge, who thinks that the statute of 4 Geo. 2 is imperative, yet it is impossible for me to deny that the statute of 4 Geo. 2, and the General Inclosure Act, and all the practice to which I have been alluding, does establish, beyond all question, that it is a reasonable execution of a power even where this clause of distress is put in; and when we are considering these circumstances let us attend to the extreme importance of the question before us in one respect. You are not merely in the execution of a power to consider what is most beneficial as between *A.* the tenant for life, and *B.* the remainder-man, but what is most beneficial to both, and to each with reference to the terms on which tenants are to be procured; and though in this case there is very little difference, perhaps, of convenience or inconvenience to the tenant, whether he is to pay on the day it is reserved, or fifteen days afterwards, yet on the one hand, if there be that little inconvenience, I say that is a ground why if the words of the power contained in the settlement will allow you to give those days, you shall not say that it is a forfeiture of the lease; and on the other hand I say, though the *quantum* of convenience be ever so small, yet that the principle in deciding these cases requires you to consider, not merely what is for the benefit of a person having an interest in one parcel of the

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inheritance, but what is for the benefit of the whole inheritance, and all the persons to take in it.

There is another way of putting it, which is material, if I am not wrong in my notions of the practice, if powers are to be executed for the benefit of all persons having an interest in the inheritance, what will be the situation of persons who have those powers is a most serious consideration; and I cannot agree with those who profess to have paid less attention to the state of titles than they ought, because, unless I mistake, nothing requires more attention; so as to what practice has introduced, and what would be the inconvenience of shaking that practice; and you are to consider, too, that unless you are to adopt the principle, that in a settlement where a power is given as nakedly in the terms of it as here, you are to execute that power in the precise terms; that no tenant for life, no trustee, nobody, in short, who has not an absolute inheritance in the estate, will ever think of executing a power without the direction of the Court to tell him whether it is right or wrong; the inconvenience of which would be infinitely great. But I am of opinion that these words are words of course; in the language of Mr. Justice *Bayley*, (and the diversity of powers is acknowledged in *Brook*;) that this is an entry for nonpayment of rent; that the words of the settlement do not condemn such a power for re-entry for the nonpayment of rent as is here reserved; and I think the qualifications in this power have had the authority of the Legislature for saying that they are reasonable; and therefore on these grounds I shall offer my opinion that these leases are valid.

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Whether your Lordships may think proper to adopt that opinion it is not for me to say; it is my duty to express that opinion.

Lord Redesdale :—Having attended throughout the discussion of this question, and having from a very early period of life had much converse with that part of the law which enables me more particularly to consider cases of this description, I mean conveyancing, I think it my duty to offer a few words to your consideration.

With respect to what has been said as to general opinions upon the subject, and the practice of conveyancers, I cannot agree with much that has been said, because I do conceive that the law has frequently been decided even in the construction of Acts of Parliament upon what has been the general understanding of lawyers as to the true construction of these Acts of Parliament; and I will instance such a case under the statute of jointure. This House determined in the case of *Drury v. Drury** that a rent-charge settled on an infant was within the statute † of jointure a good bar of dower, not because such was the literal interpretation of the statute, but because such had been the constant practice of conveyancers and others touching the subject, and it was expressly upon that ground that the decision at that time went; and I do conceive that it is of the utmost importance that the House should use its judgment by such a criterion whenever the case occurs, for otherwise all property must be in

* 3 B. P. C. 492; by the name of the *Earl of Bucks v. Drury*. See Eden's Rep. vol. 2, pp. 39 & 60.

† 27 H. 8, c. 10, s. 6.

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hazard. It is more especially so with regard to settlements which are ordinarily prepared by those persons who employ their minds in the construction of deeds, and what persons of that description consider to be the law thus acted upon for a length of time, and not disputed in courts of law, should be taken to be the general impression upon the minds of lawyers upon the particular subject, and more particularly it must have reference to that construction which ought to be put upon settlements prepared by persons of that description. How are you to understand the intent of parties in a settlement which really and truly is as much, I may say, the view which the person who prepared it has upon the subject, as the view of the parties; for the parties to a certain degree are ignorant of the words that are used, unless they are advised by the persons they may consult; and therefore the practice of conveyancers upon subjects of this description is, I conceive, a most important consideration, and whenever that has prevailed for a great length of time without impeachment in a court of justice, I take it it ought to be considered as a true exposition of the law.

I have thought it necessary to say so much upon that part of the case, because I think it would be highly dangerous to treat it in the manner in which it has been treated by a learned Judge, and, with great deference, I cannot agree to what the learned Judge said, because I think that practice is most important to the consideration of the case if you wish to preserve property to persons who are in possession,

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which may be defeated upon the construction of deeds and instruments, unless you give them the construction which lawyers have constantly put on them, though not conformable to the precise meaning supposing the language to be literally understood.

With respect to the case before you, it appears to me that it is necessary only to consider, for the purpose of the final decision of this question, the very words of the instrument. Words used in an instrument of this description must be construed according to the subject to which they are applied. The words here used, and which are in question, are applied to a power over a particular description of property. The power is one power applying to three descriptions of property, and varying according to those three descriptions: First, of property which was under the settlement, let upon leases for years, or lives, or for years determinable upon life or lives; Secondly, of property that consisted of lands not under such leases, but under rack-rent leases; and thirdly, of mines. Now is not that evidence that the persons who framed this instrument contemplated those three species of property under

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but by renewing the leases from time to time as they dropped, and therefore they gave a power to grant leases of that part, reserving what had been before reserved, in as beneficial a manner in all respects, or more, giving them the power to reserve more, but not to reserve less, not only as to the rent but as to the services. The services in every instance of a particular lease, every thing, was to be reserved exactly in the same manner as it had been reserved by the prior leases. With respect to the second description of property, there the power is to lease at the best and most improved rent, the words are added, "that can be reasonably had or obtained;" does that word reasonably, really, and truly, though perhaps introduced from caution into it, vary the instrument the least in the world? would it not be a sufficient execution of the power if the best and most improved rent had been obtained according to a reasonable estimation of the best and most improved rent? I should consider that, although the rent reserved may not be the very best rent that could be got, yet if it is fairly, and honestly, and reasonably, the best rent that can be reserved, without any fine derived by the person who granted it, that it is a good lease. The word reasonable therefore, though introduced in this part of the instrument, is a word merely of caution, and would not alter in any degree whatever the construction of the power under the settlement.

With respect to the two parts of the property, that which is on leases for lives, or for years determinable on lives, and that at rack-rent, there were introduced

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words with respect to a power of re-entry on non-payment of rent ; the first is expressed in one way, the second in another way ; we find different terms used, obviously, as it seems to me, for this reason ; with respect to the second description of property, the words are precise ‘ and so as that a clause shall be inserted, containing a power of re-entry for non-payment of the rent for twenty-eight days after it becomes due ; ’ the words there are precise ; why were they not precise in the other case ? for this manifest reason, because the other power referred to existing leases ; they referred to that which was the ordinary mode of executing the power with respect to such property ; namely, that on the dropping of one life the lease shall be surrendered, and a new lease granted for three lives. The powers which were contained in the former leases of every description were the very powers to which the settlement meant to refer. If in any of the leases that existed there was not a power of re-entry for non-payment of the rent, they meant that such a power should be contained in future, and therefore the words there used are of loose description. I think it is a mistake to suppose the words are precise ; the words are not precise ; the words are loose ; and the great error, as it seems to my mind, in the opinions that have been formed that this lease is invalid, is in the supposition that the words are precise ; I repeat they are not precise, they are merely a note or memorandum intimating that a power of re-entry is to be reserved, and if in the former leases such a power has not been reserved, (and probably the person who made the settlement

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had not an opportunity to look into all the leases, to see the form in which they were made) if such power was not reserved, then there should be such a power reserved, but in any other respect that they should be in conformity to the prior leases. It appears in the case of the lease in question that the power of re-entry was reserved in the former lease, not simply on the nonpayment of rent, but it was reserved on the non-performance of the services, a service at the mill, a reservation of a capon. If the engagements were not observed the power of re-entry extended to the whole. Taking it, therefore, that the meaning of the settlement was this, not to give any precise direction with respect to the nature of the power, but to give a general direction in the nature of a memorandum, if I may so express it, that there should be a power of re-entry ; is not that the natural construction of the words, and is not the construction which is attempted to be put upon the words a forced construction, an attempt to make them more strict than they really are ?

Suppose a contract was entered into between two persons, the one having the property, and the other willing to take that property, and that contract was so executed as that it purported there should be in the lease to be granted under that contract a power of re-entry for the non-payment of the rent, how would that contract be executed if it was to be specifically performed under a decree of a court of Equity ? would a court of Equity have ever thought they were compelled under the terms of that contract, by those words to require that the power of

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re-entry should be a power of re-entry absolutely upon the nonpayment of the rent at the day, and without the common and ordinary provision that it should only be in case there was not a sufficient distress? would not those words be construed by what was the common and ordinary practice? The common and ordinary practice certainly is to frame a power of re-entry in the manner in which the power of re-entry in this lease is framed. What then must have been the mind of the person who prepared this settlement, the conveyancer who prepared that settlement, when he inserted in the settlement that a power of re-entry for nonpayment of rent should be reserved, without expressing more? It must have been in his mind, according to the usual habit of persons of that description, and you must take it to have been in the mind of the parties to the settlement, (for it is the mind of the person who prepares the instrument that ought to give the construction of the instrument;) you must take it to have been in the mind of the person who prepared the instrument that this was a species of note or memorandum which would have been more fully expressed in the lease to be executed.

I conceive, therefore, that in this case it must be taken to be the intention of the parties to the instrument not to be precise with respect to the terms in which the power of re-entry was to be reserved, but merely to give a note signifying that a power of re-entry should be reserved for nonpayment of rent, meaning thereby that that power which was contained in the former leases, should be inserted

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wherever that power did exist in the former lease of the same lands ; but where no such power was reserved (if that was the case) then that a power such as would be a reasonable power in such a contract as I have mentioned should be inserted in the lease. If a power of re-entry was before reserved, the words were not necessary, because the rent was to be reserved in as beneficial a manner, and therefore if there was a power of re-entry in the former lease, that same power of re-entry, and no other, could be reserved ; and therefore I do conceive that when you come to apply your minds to this particular case there really is no ground of doubt, because all the doubt that has been suggested upon the subject has been founded upon a construction of the words of this instrument, which I submit they do not by any means bear ; they were not intended, as it has been supposed they were intended, to express precisely and positively what should be done ; they were intended to refer to the leases that had been previously executed of the same property, that the rent should be reserved in as beneficial a manner in every respect as before ; and if there was an exception in the former leases of the power of re-entry, that a power should be given, that is, such a power as a Court of Equity would insert in a lease, under a contract, in these loose words directing a power of re-entry to be inserted in the lease. I take it there can be no doubt whatever that upon a contract of that description so would a Court of Equity act.

But suppose this had not been a question before a Court of Equity, but before a Court of Law ;

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suppose the person who entered into that contract had executed a lease, with a power in the terms in which the power is conveyed in this case; or suppose, on the contrary, he had executed it with a power of re-entry upon nonpayment of the rent at the day, and the question had been whether in either of those cases the contract had been properly executed, or not, if the lessee had in one case objected, you have made it too strict, not according to the intention of the parties in the contract; if on the other hand it had been made in the present form, and had been objected to, that the lease was invalid, and the question had come to be agitated in a Court of Law, would a Court of Law have differed from a Court of Equity on the subject, if they had inquired in what manner will a Court of Equity execute such a contract as this? in what manner would a person employed as a conveyancer in the habits of business have framed a lease under such a contract? and then taking it to be a proper or an improper execution of the contract according to that which the habits of men engaged in the business would have led them to consider proper.

Upon the whole, therefore, it appears to me that the lease is a valid lease, because it is made, as it is found by the special verdict, in conformity to the other leases; and I consider the words of the settlement referring to those leases to have the effect of saying in this particular case,—if in any of the renewals of a lease, where there had been no power of re-entry in any particular case of that description, the question should arise how that power of re-entry was to be reserved, that it was to be reserved according to that which had been the prac-

tice of the owner of the estate in letting leases of other parts. Because in a case where the power of re-entry was actually reserved in the former leases, for the purpose of making them conformable to the former leases, which it was evident was the manner intended, it must be made conformable to a former lease, but if there was any lease in which a power of re-entry had been omitted, then it could not have reference to that lease ; but the way in which a court ought then to act would have been to see what was the manner in which leases of property of the same description, under the same settlement have been granted, reserving a power of re-entry ; and that that would have been deemed a sufficient execution of the power under the settlement ; and that the words of the power ought not to be construed as meaning that precise and positive reservation of a power of re-entry which has been contended for in this case.

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Therefore it is upon the particular words of this instrument, the settlement of 1757, and not upon any general view of the case, that I conceive that this lease ought to be supported, and that the judgment of the Exchequer Chamber should be reversed, and the judgment of the King's Bench affirmed.

Ordered accordingly.

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IRELAND*.

(COURT OF CHANCERY.)

CHARLES WARD - - - - - *Appellant.*ROBERT HARTPOLE - - - - - *Respondent.*

G. H., a tenant for life in a marriage settlement, is thereby empowered to make leases for lives of lands in Ireland, at the best rent, without fine; and a power was also given, with the consent of trustees, to raise any sum of money. The trustees, in pursuance of the power, consent that *G. H.* should, by mortgaging all or any part of the lands, or in any other manner he should think fit, raise any sum of money not exceeding 5,000*l.*

Under this power and consent *G. H.*, in consideration of 300*l.* and a rent, grants to *V. W.* part of the lands in settlement upon a lease for lives. The grant, and a receipt expressing that the 300*l.* was raised under the power and consent as part of the 5,000*l.*, were duly registered.

Before, and at the date of this grant, *V. W.* was the solicitor of *G. H.*, who was involved in litigation, and in distress.

The rent, with the premium calculated at six per cent, were considerably short of the annual value of the lands.

Upon a bill, by a tenant in remainder under the settlement, to set aside the lease, and on appeal, held, that the lease was a good execution of the power to raise money; but void, as obtained by a solicitor from his client, in circumstances of embarrassment, and at an under-value.

WILLIAM HARTPOLE, deceased, being seised of lands in Queen's county, under a grant from the Crown on the 5th and 6th of December 1707, mortgaged the premises to Thomas Tilson for 3,000*l.* which were already subject to a prior mortgage for 2,394*l.* and to other encumbrances to the amount of 7,000*l.* and upwards. William Hartpole died in 1713, leaving Martha his widow, and George his only son, an infant.

* In this case the lease, having been made by appointment under a power, was disputed on two grounds; first, that it was not conformable to the power; secondly, that it was obtained by the undue influence of an attorney over his client, and at an under-value. The decision was against the validity of the lease, on the latter ground. On the question of conformity to the power the lease was held valid.

Martha married Maurice Cuffee, who was appointed guardian to the infant, and resided in the mansion-house, and managed the estate.

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In 1731 George Hartpole levied a fine.

On the 11th of March 1731 marriage articles were executed between George Hartpole and Mary Wemys, containing a power reserved for George Hartpole to make leases of the premises, or any part thereof, for any term or number of years, or for one, two, or three lives certain, or renewable for ever, at the best and most improved rent, without fine ; such leases to commence in possession and not in reversion ; with power also for George Hartpole, with consent of Henry Coddington and James Agar (the trustees) and the survivor of them and their heirs, and of Patrick Wemys, father of Mary Wemys) during his life, and after his decease, with the consent of his eldest son Henry Wemys, to raise any sum or sums of money for such uses and purposes as he George Hartpole should think fit, so as not to prejudice the jointure thereby agreed to be provided for Mary.

In 1731, shortly after George Hartpole's marriage, Vere Ward, the father of the Appellant, who was a practising attorney of the Court of Exchequer in Ireland, went to live near the residence of Mr. Hartpole. An intimacy commenced between them and Mr. Hartpole, who was then involved in law-suits instituted against him for debts due from his father, and charged upon his estate, employed Ward, as his agent to defend several of these suits, and to adjust and settle various accounts and demands with his tenants and others ; by which means Ward became acquainted with Hartpole's situation, the circumstances and value of his estates, and the extent of his power under the marriage articles.

On the 19th of December 1732, George Hartpole agreed to demise to Vere Ward the lands of Ballyharmer, &c. for three lives (renewable for ever) at 80*l.* per annum.

In the year 1735, George Hartpole applied to Patrick Wemys, his wife's father, and to Henry Coddington, the surviving trustee named in the marriage articles of the 11th of March 1731, (James Agar, the other trustee, being dead) for liberty to raise a sum of money pursuant to the power for that purpose contained in these marriage articles.

Patrick Wemys and Henry Coddington, the surviving trustees in the said marriage articles, on the 29th of November 1735

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executed a deed to George Hartpole, whereby, after reciting the marriage articles of George Hartpole and Mary Wemys, and the power and uses therein mentioned, and also reciting that James Agar the said trustee was dead, and that the said Henry Coddington survived him; and that the estate of George Hartpole was much encumbered with debts, which could not be discharged without raising money for that purpose, with the consent of Henry Coddington and Patrick Wemys, they, Henry Coddington and Patrick Wemys, in pursuance of the power reserved to them by the said articles, did at the request of George Hartpole consent that he should and might, by mortgaging all or any part of his lands in the Queen's county, or in any other manner he should think fit, raise any sum or sums of money not exceeding 5,000*l.* in the whole, which when raised was to be by him applied towards discharging the debts affecting his estate, and for such other uses and purposes as he should think proper, which deed or instrument was duly registered at Dublin.

Vere Ward in the year 1735, continuing to practise as an attorney, was occasionally employed by Mr. Hartpole; but he had another solicitor who was principally employed by him. About this time Vere Ward was induced by Hartpole to build a house on part of his estate; and the lands of Acregallen (now Hollymount) containing about thirty-three acres, being untenanted, were proposed as an eligible situation.

About the months of February or March 1735, George Hartpole being desirous of raising a sum of 300*l.* part of the 5,000*l.* pursuant to his power and the consent of the trustees, he and Vere Ward came to an agreement for a lease of the lands of Acregallen, &c. containing about 250 acres.

On the faith of this agreement Vere Ward proceeded at a great expense to build a dwelling-house and several outhouses, to form a garden, and made many other valuable improvements on the premises.

By deeds of lease and release, bearing date the 12th and 13th days of November 1736, George Hartpole, in consideration of 300*l.* paid by Vere Ward, granted, bargained, released, and confirmed unto Ward, his heirs and assigns, all the before-mentioned lands for the lives of Vere Ward, Lucy Ward his wife, and Nicholas Ward his son, and the survivors and survivor of them, with a covenant of renewal for ever, on the fall of each and every

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fe or lives, at the yearly rent of 42*l.* payable half-yearly, clear of all taxes, quit and crown-rent only excepted. The lease and release were registered in 1736.

George Hartpole on the same 13th of November, gave the following receipt for the sum of 300*l.*: “ I, George Hartpole, of Srhewle, in the Queen’s county, esquire, do hereby acknowledge to have received from Vere Ward, of Knockbegg, in the said county, gentleman, the sum of 300*l.* sterling, being the sum mentioned in the said deed of release, by me this day executed to the said Vere Ward, of the lands of Bohernesyre, and other parcels of land therein mentioned, for three lives, with a covenant of renewal for ever, at the yearly rent of 42*l.* sterling; which said sum of 300*l.* I do acknowledge to have been by me raised and taken in part of the sum of 5,000*l.* which I am empowered to raise on my estate, by virtue of a power contained and reserved in my articles of marriage, and a consent for that purpose, bearing date the 29th day of November 1735, under the hands and seals of Patrick Wenmys, esquire, and Henry Coddington, esquire, trustees in the said articles mentioned,” which receipt was registered in the words above stated.

This sum of 300*l.* was the first sum raised by George Hartpole under the power in his marriage articles.

On the 25th of January 1755, Vere Ward conveyed his interest to Robert Birch, in certain leases, dated in 1745 and 1750, which had been substituted for the lease of 1732.

George Hartpole died on the 4th of December 1763, leaving the respondent, Robert Hartpole, his eldest son and heir, a minor.

Robert Hartpole having attained his age of twenty-one in Hilary term 1765, levied a fine, and suffered a recovery of the lands.

On the 24th of April 1765, Robert Hartpole filed a bill in the Court of Chancery in Ireland, against Vere Ward, Robert Birch, and others, stating among other things the several matters aforesaid, and praying that the several sales therein mentioned to have been made by George Hartpole might be set aside, as not warranted by the power in his marriage articles; and that the leases made to Vere Ward might also be set aside, as having been obtained by fraud and at great under value; and that the other sales therein mentioned to have been made by George Hartpole might also be set aside, as having been obtained by fraud and at under value; and that the deeds of purchase and leases afore-

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said might be brought in to be cancelled, or disposed of as the Court should direct; and that Robert Hartpole might be decreed to the mesne rates and profits thereof, severally from the death of George Hartpole, his father.

On the 18th of November 1765, Vere Ward put in an answer, stating among other things, that the fines paid on the leases were applied to discharge encumbrances affecting the estates of the Respondent; that George Hartpole had power to make the leases upon fines; that the rent reserved was the full value; that he had expended large sums in the improvement of the premises, and that the leases were fairly obtained without fraud, misrepresentation, or improper influence.*

Vere Ward on the 30th of May 1771 filed a cross-bill against Robert Hartpole, stating the several matters in the answer to the original bill, and particularly stating that Lucy Ward, one of the lives in the leases, was dead; and that Vere Ward soon after her death had tendered the rent and fine, and a deed for renewal, pursuant to the covenant contained in the lease of 1736, by inserting the life of the Appellant, Charles Ward, instead of Lucy Ward, which Robert Hartpole refused to execute, or to receive the said fine; and further alleging that forcible possession of the lands demised had been taken by the Respondent, and rents improperly received from the under-tenants; prayed that the Respondent might be obliged to confirm all the leases made by George Hartpole, and deliver up the lands of Bohernesyre, and account with Vere Ward, and pay him the sum of 167*l.* 10*s.* and such other sums as he, Robert Hartpole, had received, or should receive thereout, and execute a renewal of the lease of the 13th of November 1736, and the leases assigned by Vere Ward to Robert Birch. And that in case Robert Hartpole should refuse the same, he might set forth a full account of the personal estate of George Hartpole, and how the same had been disposed of, and whether he died intestate, or made any will, and who acted as executor or administrator; and also what debts affected the real estate of William Hartpole and George Hartpole; and which of them had been discharged by George Hartpole or his guardians, and what

* An amended bill and answers to it were filed, relating chiefly to the age of George Hartpole when he executed the articles of settlement. but raising no question material to the points on which the case finally was adjudged. These pleadings are therefore omitted.

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assignments had been executed, and that all proper accounts might be taken.

The Respondent, on the 24th of February 1770, put in his answer to the cross-bill, thereby stating a grant of the premises in question from King Charles the Second to William Hartpole, his grandfather, and his heirs male *, and that he died in 1713, leaving George Hartpole, his son, an infant, who became seised, and that he died in 1763, leaving him, the said Robert Hartpole, an infant, who became entitled to an estate-tail in the premises. He admitted that George Hartpole, his father, obtained the power before stated from the trustees to raise 5000*l.* by leasing or otherwise ; and that by the instrument of the 19th of December 1732, Vere Ward obtained a demise from George Hartpole, for lives renewable for ever of the lands therein comprised, and admitted the leases of the 13th of March 1745, and 2d of May 1750 ; and admitted that the demise of 1732 was surrendered by Vere Ward ; on the execution of the leases of 1745 and 1750 ; and by such answer admitted that V. Ward had made several valuable improvements, and plantations, as in the cross-bill stated, to a considerable amount ; and he also admitted the lease of 1736, and that the lands were not then in an improved state, but were encumbered with briars, thorns, and stumps of trees. He also admitted that on the death of Lucy Ward, Vere Ward had tendered the rent and a deed of renewal, pursuant to the covenant in the said lease, and the fine for renewal. And the Respondent by such answer admitted that Vere Ward did not owe any rent for the lands held by Thady Moore, but that the Respondent had not only received all the rents to May 1767, but also 167*l.* over and above ; and thereby admitted he refused to renew Vere Ward's lease ; and that his father made his will and appointed executors, who had declined to act, and that no person had administered ; that his father left some personal estate ; and that his father and his guardians had paid judgment and other debts affecting his real estate : and he set out a schedule of his father's personal estate, and into whose hands it had come, and how it had been disposed of ; and admitted that he had to that time administered his assets.

Vere Ward replied to the answer to the cross-bill, and the Respondent replied to Vere Ward's answer to the original and

* Quære, heirs male of his body.

original bill should be dismissed as to the defendant Birch, without costs, by consent; and as to so much of the bill as sought to set aside the lease of the 13th of Nov. 1736, it was decreed that the Respondent was entitled to an account of the profits of such lands in question as Vere Ward was in possession of at the time of the death of the Respondent's father; and that the Respondent was to refer the account to one of the Masters of the said court to take the oath on the taking of which the parties were to have satisfaction. And it was thereby further ordered and decreed that an injunction should be awarded in the original cause to keep the Respondent in possession of such part of the lands as he then already in his possession, but not to issue a writ of ejectment, garden, and demesne, until the 1st day of then next term, or further order, but without prejudice to any claim that Vere Ward might have against the representatives of George Hartpole, or his covenant in the said lease of the 13th of Nov. 1736; and that the Respondent should have his costs in the original cause to be taxed by the Master: And it was further ordered and decreed, That the cross-bill should be dismissed with costs, not only as to that part which sought to set aside the lease of 13th of Nov. 1736 confirmed, but also the part which sought a renewal thereof; and as to such part of the bill as sought a satisfaction out of the personal assets of George Hartpole, it was ordered that the same should be dismissed, *no personal representative of George Hartpole appearing* at the Court.

Nicholas Ward, the eldest son, and next of kin of Vere Ward, became his administrator.

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The suit, decree, and proceedings were revived by an order of the 8th of June 1774. Nicholas Ward, after exhibiting the original appeal, died before the hearing, and the Appellant, Charles Ward, as his heir at law, devisee, and residuary legatee, took administration, with his will annexed, and also administration *de bonis non*; and the appeal of the original testator was revived by the Appellant Ward.

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The case was argued for the Appellant by Mr. *Wedderburne*, (then Solicitor General) and Mr. *Dunning*, on the following grounds :

1. Because *from* the Respondent's statement in his original and amended bills of the time of his grandfather's death, and the age of his father at that time, it was impossible his father could have been of full age at the time of his entering into the articles of the 11th of March 1731, and therefore he could not be bound by those articles.

Supposing George Hartpole to have been properly bound by the articles made on his marriage, yet as he had thereby a power to let leases of his estates comprised in those articles in the manner therein mentioned, and had also by those articles a power to raise any money thereon, with the consent of the trustees, or the survivor of them, and his wife's father, or if he should be dead, her brother; and as the surviving trustee and his wife's father executed such instrument as above stated, signifying their consent that he might by mortgaging his estate comprised in such articles, or in any other manner he should think fit, raise any sum not exceeding 5,000*l.*, such lease so made by such deeds of the 12th and 13th of November 1736, in consideration of 300*l.* really paid by Vere Ward, ought to be considered as a good lease, as being a proper execution in part of the power for raising money, so far as to raise 300*l.* in part of the 5,000*l.* he was so empowered to raise, and the receipt given by George Hartpole shows that was the intention of taking such sum of 300*l.*

It is objected that as there are two distinct powers contained in the marriage articles,—one for letting leases of estates therein comprised, and the other for raising money on those estates,—it was to be presumed that it was not intended that the power for

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raising money should be executed by letting leases, the power for letting leases only enabling George Hartpole to let such leases at the best improved rents, without taking any fines. And the lease in question having been made in consideration of 300*l.* would not be a good lease within the power for making leases; and as being a lease it would not be a good execution of the other power for raising money.

But it does not at all follow that because the power of letting leases of the estate was in the common form, they should be leases in possession and not in reversion, and should be let at the most improved rents without taking fines, therefore the other power for raising money, which was general, and only limited as to the mode of executing it, to be with the consent of the trustees or the survivor and the father, or if he should be dead, the brother of the lady, might not with their consent be executed for raising such money, either by letting parts of the estates for terms of years, or selling or mortgaging any part of the estates, or in any other manner whatever; and as the surviving trustee and the lady's father did, by the instrument of the 29th of November 1735, consent that George Hartpole might *by mortgage, or in any other manner he should think fit, raise any sum not exceeding 5000*l.**, it was presumed he had thereby power to raise any part of it by taking a sum of money for letting leases, or in *any other manner he should think proper*; and that therefore the lease in question, made in consideration of 300*l.* being a fair lease, and made for a fair and valuable consideration, is a good execution of part of that power, and as such, a good and effectual lease.

It is further objected, that the 5,000 *l.* which George Hartpole was so empowered to raise was all actually raised by mortgage of the estate; and therefore the 300 *l.* raised on making such lease is more than he had power to raise.

But it appears by the pleadings in the cause, that the fact of the money having been raised by mortgage was not properly put in issue by such pleadings, and that therefore the evidence to it ought not to have been read; and when such evidence was read, it thereby appeared that the money was not so raised by any such mortgage till the year 1742, which was six years after the lease in question was made; and therefore, if the lease in question was a good lease within the power for raising money at the time of making it, nothing that was or could have been done after-

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wards by any of the parties could any ways prejudice or invalidate that lease. And the rather that such lease and the receipt for 300 l., which showed that it was made in pursuance of the power for raising money, were both registered ; so that any person afterwards advancing money under that power might see that such sum of 300 l. had been then already raised in part of such 5,000 l.; and there was the more reason to support the lease in question in a court of equity, as the same was really made for a good and valuable consideration. And although the Respondent in his bill charged that it had been obtained by fraud and undue means, and at an undervalue, yet he had not attempted to support such charges by any proof. And it appeared on the contrary, by the most respectable evidence on the part of the Appellant, that the estate at the time of making such lease was in a very bad condition ; and that the lease was made for a good and valuable consideration ; and that the rent and the consideration paid for such lease was a full and fair value and consideration for such lease. And as the Respondent's grandfather was entitled to the estate comprised in such lease only under a grant from the Crown to him and the heirs male of his body ; and he had not at the time of granting such lease, nor for several years afterwards, any son born ; so that if he died before he had a son the estate would have reverted to the Crown. He had no other way of raising any money under such power than by granting leases of estates at rents something below the full value, and taking considerations for such leases, as nobody would then have lent any money on a mortgage of such estate under so precarious a title ; and it appeared that he did not raise any money on any mortgage of the estate till six years after granting such lease, and after he had issue male.

If the lease in question had not originally been a good lease, yet as the Respondent after the death of George Hartpole his father, and after the Respondent had levied a fine, and suffered a recovery of the estate in question, actually received rent of the premises from Thady Moore, on Vere Ward's account, in the same manner as the Respondent's father had done, and Thady Moore was then tenant of part of the premises to Vere Ward, and paid the rent to the Respondent up to the 1st of May 1767, which is admitted by the Respondent's answer ; and also 167 l. 10 s., over and besides the rent incurred to that time ; the Respondent ought to be considered as having thereby con-

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firmed that lease, and as being thereby barred and estopped from impeaching such lease, and consequently ought to renew the same according to the covenant therein contained. . . .

If the lease in question could not be supported by the powers in the articles of the 11th of March 1731, and the same was on that account to be set aside in a court of equity, yet as the same was not, nor could be set aside on account of any fraud, or as having been granted at any undervalue, Vere Ward ought to have had an allowance for the pecuniary consideration he paid for such lease, and the monies he laid out in buildings and improvements on the premises, for which no provision was made by the decree.

The cross-bill ought not to have been dismissed on account of no personal representative of George Hartpole being before the Court; for as Vere Ward was certainly, in case the lease in question was to be set aside for want of George Hartpole having power to make it, entitled in a court of equity to have satisfaction out of George Hartpole's estate for the money paid by Vere Ward for such lease, and for the money he laid out in buildings and improvements upon the estate; and as it appeared by the Respondent's answer to the cross-bill, that although he was not the legal personal representative of his late father, yet he had actually possessed and administered his father's personal assets in the same manner as if he had actually been the personal representative; so that such personal representative, if there had been one, would only have been a proper party in point of form for taking the account, which in substance must and could only have been taken against the Respondent, who had alone possessed the assets. The Court might have directed such account to have been taken against the Respondent, giving Vere Ward leave to bring a proper legal representative of George Hartpole before the Master to substantiate the proceedings. Or the Court might have ordered the case to have stood over, with liberty to Vere Ward to have amended his bill, and brought proper parties before the Court, upon his paying the costs of that day's hearing.

For the Respondents, *Mr. Thurlow* (Attorney-General) and *Mr. Skinner*.*

* The case was also signed by Mr. Fearne.

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It is in proof that George Hartpole was of age at the time of entering into his marriage articles in March 1731, and consequently he was bound by them. Under these articles he became only tenant for life of the lands leased by him to Vere Ward in 1736, without any other power of granting leases to exceed his own life than what was reserved to him by these articles. The leasing power reserved to him by these articles was confined to the granting of leases at full and improved rents, reserving no fine, and to commence in possession, and not in reversion. The lease granted to Vere Ward in 1736 had no one of these requisites to give it any validity ; it was a lease granted at a considerable undervalue upon a fine of 300 £., and not to commence in possession, but in reversion, there being prior leases of the same lands then subsisting. And to contend that a lease by a tenant for life, so totally inconsistent with and repugnant to the only power of leasing reserved to him, can be supported against those in remainder, is in effect to maintain that to reserve a leasing power to a tenant for life is nugatory, and that such tenant is neither restrained nor benefited by it, but may grant what leases he pleases without regard to such power or its restrictions.

But it is alleged that the lease in question was not granted in pursuance of the power of leasing reserved to George Hartpole by his marriage articles, but in exercise of the power contained in the same articles for enabling George Hartpole, with the consent of the trustees, to raise money for such purposes as he should think fit ; that George Hartpole accordingly obtained the consent of Patrick Wemys and Henry Coddington, by the instrument or deed of the 29th of November 1735; for raising 5,000 £.; that the lease to Vere Ward was made in pursuance of this power and consent ; and that the fine of 300 £. taken upon that lease was raised as part of the said 5,000 £. And in support of this, we are referred to a receipt said to have been given by George Hartpole to Vere Ward for the said 300 £. fine, expressing that the said fine was raised and taken as part of the 5,000 £. mentioned in the said deed of consent ; and (what is more extraordinary) this receipt itself appears to have been registered.

It plainly appears that the lease in question was not intended, or supposed to be made in pursuance of the power given to George Hartpole for raising 5,000 £., because that power is not at all mentioned or referred to in that lease, nor does the lease

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itself afford any the most remote suggestion of an intended or supposed execution of that power; an omission which it is impossible to account for, if that lease was really intended as an execution of that power, and to derive its validity from it. As to what is mentioned in the receipt, it appears to have been a contrivance of Vere Ward to give a false colour to the transaction. The unusual artifice of registering a receipt of this nature seems plainly calculated to answer a purpose which a transaction fair and justifiable upon the face of it stands in no need of. And indeed what is stated in the Appellant's answers and cross-bill, that the lease of 1736 was granted in pursuance of an agreement of 1735, seems to put an end to the pretence of this lease being made in execution of the power required by the deed of consent. And there is another very material circumstance, which seems to prove that this fine of 300 *l.* taken upon the granting the lease to Vere Ward could not have been taken by George Hartpole himself as any part of the 5,000 *l.* which he was so empowered to raise, which is, that George Hartpole did actually raise the sum of 5,364 *l.* in pursuance of that power, by three several sales of different parts of the estates over which such power extended. Now this fact leaves no room at all for any constrained construction to bring the 300 *l.* fine taken upon Vere Ward's lease within the description of any part of the 5,000 *l.* raised by George Hartpole in pursuance of his power. The whole of that sum, and more, having been thus raised accordingly in a manner more direct, and pursuant to that power, than the extraordinary mode of granting leases upon fines.

The power for raising 5,000 *l.* could not enable George Hartpole to grant the lease in question; the leasing power contained in the marriage articles expressly restrained George Hartpole from granting any leases at an undervalue, or upon fines, or in reversion. Now is it possible to imagine that the power immediately following was intended to reduce the preceding power to a nullity by removing these restrictions, and establishing those very leases which were so expressly provided against in the leasing power? Powers for raising money are usually executed by sale or mortgage of the lands, and are not supposed to impart a leasing power, which is always provided for by a distinct and very different clause. The manner in which the execution of the power is guarded by the different consent of trustees, mani-

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manifests the intention to prevent the issue or those in remainder from being unreasonably or unnecessarily prejudiced by the execution of it. Such intention is answered by the usual mode of raising money by sale or mortgage, because in those cases the value of the estate is diminished no further than to the amount of the sum raised by the execution of the power: but if the power for raising 5,000 *l.* enabled George Hartpole to do it by leasing the lands upon fines, it is evident that he might, in order to obtain an immediate supply of the 5,000 *l.* have prejudiced the estate to the amount of 20,000 *l.* or upwards, by procuring the desired fines upon leases, without reserving one fourth of the annual rent which the lands were fairly worth, after allowing for the fines paid upon such leases. But it cannot be imagined that a latitude of power which might eventually prove so prejudicial to the issue could ever be consistent with the obvious intention of marriage articles, which were meant to secure a provision for such issue.

It is insisted, that if the lease granted to Vere Ward in 1736, did not pursue either the leasing power, or the power for raising the money, and is therefore to be set aside, yet the Appellant is entitled in equity to be repaid the fine he originally paid for the lease, and also to be allowed for the money he has expended in real improvements on the lands.

Whatever attention might have been paid to a claim of this nature in behalf of a lessee taking lands at a fair and full value, without notice of marriage articles, and entirely innocent of any fraudulent or undue practices in the obtaining his lease, it certainly cannot be urged with any degree of propriety or weight in the present case, where it is in full proof that Vere Ward had notice of the marriage articles at the time of obtaining the lease, and then and for some years before acted in the capacity of law-agent to the lessor, and for part of the time received his rents, and managed his estate, where it appears that he availed himself of the advantages of his confidential situation to impose upon his employer, and prevail upon him, under the pretence of assisting him in his pressing circumstances, to grant him the lease in question at a very considerable undervalue.

At law it is clear the Appellant would be entitled to no compensation or allowance in respect of the insufficiency of a title of which his father had notice at the time of taking the lease. And it must be submitted that for an agent to take advantage of

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his intimacy and influence with the person employing him, and to avail himself of the opportunities afforded him by his situation, as well as of the necessities of his employer, to obtain from him at a great undervalue a lease of part of the lands intrusted to his agency, appears to be such an abuse of confidence, such a flagrant breach of trust, as can give no claim to the favour, encouragement, or countenance of a Court of Equity.

The case having been argued on the 24th, 25th & 31st of January 1776, the judgment was moved in the House of Lords to the following effect, by

Lord Mansfield * :

The Bill upon which this decree was made was brought by the Respondent against the Appellant's father, Vere Ward, to set aside a lease granted to him by the Respondent's father, George Hartpole, of certain lands in the Queen's County in Ireland, in consideration of a fine of 300*l.* and a rent of 4*l.* a year, and the grounds upon which it is sought to set aside the lease, are—

“ 1st. That George Hartpole was only tenant for life of the lands in question under his marriage articles, with power ‘to make leases for any term of years, or for one, two, or three lives certain, or renewable for ever, *at the best improved rent without fine.*’ Such leases to commence in possession, and not in reversion.’ That the lease in question was granted on terms contrary to that power, and that therefore it is void.

“ 2dly. That this lease was obtained by fraud, imposition, and misrepresentation of the value.”

The Appellant's father by his answer insists that the lease is good under the power reserved to George Hartpole by the marriage articles, enabling him “ *with the consent of the trustees, to raise any sum or sums of money for such uses and purposes as he should think fit.*” And the subsequent instrument executed by the trustees by which they consent “ that he should raise the sum “ of 5,000 *l.* by mortgaging all or any part of his estate, or in “ any other manner he should think fit.” He says, that the lease was granted at the full value, and denies that he made use of any fraud or misrepresentation in obtaining it.

* For this Note of the Judgment I am indebted to Mr. Palmer of Gray's Inn.

The first question in this case is, whether the lease now impeached, as having been granted upon a fine, is at all within the substance or meaning of the power for raising money, or can be considered as any execution of it?

Powers, especially those in family settlements, being considered as reservations of so much of the absolute dominion of the estate, are to be construed equitably, and most favourably for the grantee; and therefore, where through mistake or inadvertency the several circumstances required by a power are not strictly and formally complied with, equity will interpose and supply the defect. The power indeed cannot be exceeded; but within the extent and compass of it, a Court of Equity will aid all defects of circumstances, and even where powers have been exceeded the execution is not absolutely void; for the court will correct the excess, and supply the execution as far as the power warrants.

In this case I am strongly inclined to think the decree proceeded chiefly on the ground of the lease not being warranted by the marriage articles. It is certain that the lease is not within because not made according to the power of *leasing*; but, upon the true construction of the power to raise money, and the consent of the trustees, and considering the known and long-established usage in Ireland, I think that this mode of *fining-down* might be one way of raising the money: the articles reserve a power to make leases for any term of years, or for one, two, or three lives certain, or *renewable for ever*; for a notion then prevailed in Ireland that granting leases for lives renewable for ever was a very advantageous manner of letting lands; it has however been found exceedingly detrimental and inconvenient.

The power to raise money enables George Hartpole to raise *any sum* for such uses as he should think fit, with the trustees consent; the trustees give their consent, and authorize him to raise 5000 *l.* by mortgage or otherwise, as he should think fit. Now, I am of opinion that by the terms of this power and the trustees consent he was clearly warranted to raise it by fines. The power is very remarkable and very uncommon; he is enabled to raise *any sum of money* for such uses and purposes as he should think fit, with the trustees consent. There is no sum mentioned; no particular mode prescribed for raising it; no restriction whatever as to the execution of the power, but that it should be *with the*

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trustees consent. Now this power operates as an exception, and so far as respects the execution of it, the power of leasing does not extend or interfere. When the power for raising money is satisfied, then indeed all leases afterwards made must be in conformity to the terms of the power of leasing, but those made in execution of the power of raising money cannot be affected by it. The trustees, as I have observed, tie the tenant for life down to no particular mode, but leave it to his discretion to raise it by mortgage, or in any other manner as he should judge proper; fining-down the rents was one of those other ways; selling was another; there was no way of raising money but by mortgaging, fining-down, or selling: he was left at his option. Great part of the lands he sold; they are quietly enjoyed, and no question is made as to the validity of those sales; why then might not money be as well raised by fines? It can make no difference by what means it is raised provided the value is given. I am clearly of opinion that it might be raised by *fines*, and that so far the lease is a good execution of the power under the trustees consent.

There was an argument made use of that the whole money and more had been raised by *sale* of the lands, and consequently that the 300 *l.* paid for the lease could not have been raised as part of the 5,000 *l.* But this will not hold, for that money was not raised for some years after granting the lease, and the lease takes notice that the 300 *l.* was raised as part of the 5,000 *l.*; and if the lease was good at the time of making, nothing done afterwards can invalidate it, if then the lease was within the power.

The next question is, whether there was any collusion or connivance between George Hartpole and the Appellant's father in making this lease, or any practice or fraud made use of by Ward in his relation of agent to the Respondent's father in obtaining it.

If there were any collusion between the tenant for life and the lessee, or any undue practices on the part of the latter to the prejudice of those in remainder, that would afford a sufficient ground for setting aside the lease, but it does not appear there was; there is no proof of it; the fine taken is no secret; it is recited in the body of the deed, and in the receipt it is mentioned to be raised as part of the 5,000 *l.* under the trustees consent and the

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power. It is a strong circumstance also that the receipt is registered; for though this is taken notice of on the part of the Respondent as a contrivance to answer some unfair purpose, yet here it was highly proper, in order to show that the sum of 300 l. had been raised in part of the 5,000 l.; there is no evidence of any misrepresentation; and it is not pretended that the Respondent's father was a weak extravagant man, liable to be easily misled or imposed upon, or that he did not apply the money thus raised to a good use; on the contrary, it appears that he very laudably applied it in paying off debts and discharging encumbrances to a very large amount, which descended upon him with the estate.

The last question, therefore, is, whether there was any fraud in this transaction as to the rent reserved by the lease? for if there was, it being to the prejudice of the heir, or person next in remainder under the articles, the lease would not be good as against the Respondent.

Now with respect to the value of the lands there is a good deal of contradictory evidence, and if the decree turned upon that point further inquiry might be ordered to ascertain the value; an issue could be directed. But I am unwilling that the parties should continue any longer in litigation, especially as upon the most attentive consideration of the evidence I am of opinion that sufficient appears to show that the rent reserved upon this lease was not the full value. From the evidence of one of Ward's own witnesses, and by his own accounts, as stated in the Appendix to the Respondent's case (which seems to be accurate,) it appears most clearly that the lands were let at an undervalue.—[Here his Lordship stated the calculation of the value of the lands from the Appendix, observing, that six per cent should be computed for the interest of the fine of 300 l., that being the legal interest in Ireland, instead of five per cent, which was only allowed in the calculation.]—The account of Ward himself proves that the lands were worth 80 l. 17 s. 8 d. a year, whereas the rent reserved by the lease, together with the interest of the fine at six per cent, is only 60 l., so that either the fine was inadequate, or the rent considerably below the value. If then the lease was not taken at the best improved rent, but at an undervalue, it ought not to stand, especially if any advantage

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was taken of George Hartpole's situation, of his necessity and distress in obtaining this lease, equity will relieve against it. That such an advantage was taken. I am strongly inclined to believe; and what weighs with me is this,—the Respondent's father was a gentleman, like many others, involved in a great number of law-suits and difficulties *, and his affairs were exceedingly embarrassed: Ward was his agent and attorney, and consequently well acquainted with his situation, and seems to have been very ready to take advantage of it. This appears from a remarkable letter of Ward to Hartpole, dated the 8th November 1733, which is proved in the cause, and stated in the Appendix to the Respondent's case: in this letter Ward recommends “Fortitude to Mr. Hartpole in the gloomy appearance
“ of his affairs, and vigour in opposing the various suits and
“ difficulties he was engaged in:”—takes notice of his own conduct, and the expense of the suits, and desires to know “Whether
“ Mr. Hartpole would have the accounts between them appear
“ in the shape of bills of costs, or fix a *certain annual sum* in lieu
“ thereof.” What, an attorney requires a *certain annual sum*! Why not his bill? But your Lordships will find he did not forget his bills. In one bill, amounting to 75*l.* 11*s.* is this article, “For attendance and care of several affairs relating to
“ Mr. Stevenson, and other creditors, from 1731 to 1734, 30*l.*” And in another bill, the amount of which is 25*l.* there is this charge, “Attendance on Mr. Hartpole's affairs, in general, &c.
“ from July 1734 to May 1736, 15*l.*” Such general charges as these most certainly would not be allowed to any attorney here.

We see then the distresses which Mr. Hartpole laboured under, and the disposition of Ward. In this situation the one was very apt to give, and the other too ready to take a good bargain. And if an attorney, knowing his client to be in such circumstances, takes from him any reward, or any security by way of gratuity or reward, pending the suits or business in which he is concerned, though no particular express act of fraud is proved, yet it shall not stand; it would be attended with dangerous consequences, and therefore it shall not be allowed. I remember the case of one Japhet Crook, a most vile miscreant, who had been engaged in various suits and scrapes, indicted for per-

* See *Kenrick v. Hudson*, in the House of Lords, 1773.

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juries, forgeries and other crimes, and promised his attorney, who had been useful in procuring bail for him, and otherwise, as a compensation above his bill, to leave him 1,000*l.* by his will; and he gave the attorney instructions for preparing his will, with such a legacy, which he executed. The attorney afterwards, lest Crook should change his mind, got a bond from Crook to oblige him to leave the 1,000*l.* by his will. They afterwards quarrelled, and Crook made a new will, in which he omitted the legacy, stating as his reason that he had been imposed upon by his attorney; and he soon afterwards died possessed of a considerable fortune. The attorney sued the representative, who filed a bill to set aside the bond. The attorney put in his answer, and the cause came on to be heard before Lord Hardwicke. At first it did not stand a minute; no fraud was proved to have been made use of by the attorney, and the bill was dismissed. I, however, advised a re-hearing, and the cause came on again; and though there was no proof of fraud having been practised in obtaining the bond, yet from the general danger of establishing a precedent of an attorney taking such a security from a client in distress, as well as from the particular circumstances under which the bond was given, Lord Hardwicke reversed his own decree, and referred it to the Master to consider whether the attorney was entitled to any and what allowance.

The lease in question was granted for a consideration grossly inadequate; Hartpole knew it, but his distress compelled him to give way. Ward availed himself of the advantage of his situation, and thus obtained it at an undervalue. I am, therefore, of opinion that upon the ground of undervalue, coupled with the other circumstances which I have stated, the lease is void as to the Respondent, and that it should be set aside. But upon what terms should this be done? It is a maxim, that he who demands equity must render it; and when a man lays out money in lasting and useful improvements, and has not the benefit of them, why should he not be allowed for it? It is surely but just, as the Respondent has the advantage of the improvements made by the Appellant's father on the lands, and the Defendant is prevented from enjoying them, that some compensation should be made to him. Why should not the fine be paid back?

* See *Walmesley v. Booth*, 2 Atk. 25. 27.

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The decree saves a remedy against the personal representatives of George Hartpole on his covenant, and yet dismisses the cross-bill for want of a representative being before the Court, although it is clear that the Respondent had possessed and administered his father's assets, and thereby became executor *de son tort*, so that such representative would have been necessary in point of form only, for the account must have been taken against the Respondent, and therefore the bill should not have been dismissed upon this ground. But the account might have been taken against the Respondent, giving the Appellant liberty to bring a legal representative before the Master, or have ordered the cause to stand over, with liberty to amend the bill, and bring the proper parties before the Court. But what I shall propose will render this unnecessary.

There is another circumstance,—the costs. Costs, I take it, were given upon the ground of the lease having been obtained by fraud ; but I think in this case each party should bear his own costs. I therefore submit the following variations ; viz.

1st. That the lease be set aside upon payment to the Appellant of the fine of 300*l.* and the money laid out in the lasting improvements, with interest from the death of George Hartpole ; and that an account be taken of the said 300*l.* and money laid out in improvements.

2dly. That so much of the decree as gives costs in the original or cross-cause, or saves any remedy against the representatives of George Hartpole, or enjoins the Respondent to be put into immediate possession, be reversed.

Which variations were agreed to by the House *.

* See the order in the printed cases of 1776, N^o 7.

One of the arguments made use of at the Bar, to show that the lease was not within the leasing power, was, that it did not commence in possession ; but this was not supported, for the proof offered, viz. memorials of the leases of part of the lands which were subsisting when this lease was made, could not be read, because it did not appear by the register's notes that they were read on the hearing below ; and it is a rule that no new evidence can be read on an appeal, except where the refusal of permitting evidence offered to be read on the hearing is complained of by the appeal. But had the evidence been admissible, it would not have affected the decision.

SCOTLAND.

(COURT OF SESSION.)

BOYES - - - - - *Appellant.*BAILLIE - - - - - *Respondent.*

PROOF of indecent familiarities between a wife and a medical attendant in the family of the husband, held to afford a presumption of adultery, and a sufficient ground for a divorce.

After sentence of divorce in the Commissaries Court, affirmed by the Court of Session, a verdict and judgment subsequently obtained in an action for damages, finding the adultery not proven, is not admissible, upon an appeal, to affect the sentence or the judgment of affirmance. Such subsequent facts may be stated by leave of the House in an additional case.*

THIS was a proceeding which originated in the Commissaries Court of Edinburgh to obtain a divorce for cause of adultery. The case on the part of the Respondent was supported by evidence of the grossest acts of indecency, affording inferences, short only of ocular demonstration, that a criminal intercourse had existed between the Appellant and a person who visited in the family, partly as an acquaintance, and occasionally as a medical attendant.

* Other points were decided by the interlocutors in the Court below; viz. that reasons of reprobator against the Respondent's witnesses on the ground of insanity, immorality, and undue influence, were irrelevant; that objections to the competency of a witness were admissible only to her credibility; and that the costs of an agent in Edinburgh, to conduct the defence of the Appellant, ought to be disallowed.

“ divorce, &c.”

In the course of the proceeding, by proof on the condescendence of the Respondent a protest, of reprobators, was instituted against the Appellant against the Respondent's will on the ground of insanity, immorality, and infidelity; and after the proof had been taken by both parties the Appellant was allowed to give evidence on the condescendence of reprobator; upon advising the Commissaries found the reasons of reprobation condescended on not relevant; to which they adhered upon a reclaiming petition.

The Appellant thereupon petitioned to present a bill of advocation to the Court on the question of reprobators, which was granted.

Objections were also taken by the Respondent to the admissibility of *M. W.* when brought for examination as a witness for the Respondent. Her deposition was allowed to be taken, but to be sealed up, and to lie *in retentis*.

On advising the pleadings of the parties on the admissibility of her evidence, the Court “ allowed the depositions of *M. W.* to be taken.”

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“ merits of the cause come to be advised ;” to which judgment they adhered on petition, and refused to permit the Appellant to bring this point under view of the Court of Session by bill of advocacy.

Upon the question of costs, objections having been taken and sustained to the Appellant’s account of expenses in conducting her defence, she petitioned the Commissioners that they might be allowed, or at least to remit, the account to the auditor, with directions to allow the expenses of the Appellant’s agent in Edinburgh. The prayer of this petition was refused, and thereupon the Appellant presented a bill of advocacy to the Court of Session, praying “ a remit with instructions to the Commissioners to “ alter their interlocutor of the 19th of May 1815, “ &c. and to allow a proof of the circumstances she “ has relevantly offered to establish, both in repro- “ bator and as additional evidence, &c. and to find “ her entitled to full expenses, conform to her agent’s “ accounts, which are not alleged to be improperly “ stated, but modified in respect she should not have “ had the aid of an agent, and also to sustain the “ other charges disallowed.” The Lord Ordinary having refused the bill, the Appellant presented a petition to the Lords of the second division of the Court of Session, praying them “ to remit to the “ Lord Ordinary to alter his interlocutor, and to “ the Commissioners to alter, &c. ; and to find that “ the facts, circumstances, and qualifications proved, “ do not infer the defender’s guilt of adultery ; or “ &c. to allow the defender a proof of the reprobato- “ tors, and also of the *alibi* of Mr. Bryson on the “ night and morning particularly condescended on

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“ in the body of the petition.” The prayer of this petition having been refused, an appeal to the House of Lords was presented from the several interlocutors of the Commissioners the Lord Ordinary, and the second division of the Court of Session. After the appeal had been presented, and the cases laid on the table of the House, the Appellant obtained leave to print, and accordingly printed and presented an additional case, stating the following facts :

The Respondent, in June 1812, brought his action in the second division of the Court of Session against James Bryson, for reparation and damages in regard to *the alleged adultery* ; concluding that the defender, Mr. Bryson, should be decerned to make payment to the Pursuer of the sum of 10,000*l.* of damages, with 500*l.* of expenses of process.

After various proceedings in this action the Court directed an issue therein to be sent to the Jury Court to be tried by a Jury. In consequence of this direction the following issue was settled for the purpose of trying the question between the parties :

“ Whether the defender did on the 1st day of
 “ January 1808, or at any time between that time and
 “ the 1st day of January 1812, seduce and maintain
 “ an adulterous connection, and did commit adultery
 “ with Mrs. Elizabeth Cross, or Boyes, then the
 “ wife of the Pursuer, at the Pursuer’s house of
 “ Carnbroe, or in the neighbourhood thereof.”

A trial was accordingly had upon this issue, before the Jury Court, on the 12th and 13th days of March 1818 : when a verdict was given by the jury impanelled to try the said issue, finding “ that

“ in respect of the matters of the said issue proven
 “ before them, they find the fact of adulterous con-
 “ nection between the 1st of January 1808 and the
 “ 1st of January 1812 is not proven.”

When this verdict was reported to the Court of the second division, the Pursuer applied to the Court for a new trial, upon two grounds;—first, that the verdict had been given contrary to the evidence; and secondly, that certain facts which he alleged, and offered to prove, as showing the defender's guilt, had come to his knowledge since the trial. Upon this application the Court directed counsel to be heard in their own presence.

After hearing counsel accordingly, the Court, on the 10th of July 1818, pronounced an interlocutor, refusing the application for a new trial, in so far as the same is founded on the ground of the verdict being contrary to evidence; but before further answer, ordaining the Pursuer to put in a special articulate condescendence of the facts which he alleges to have come to his knowledge since the trial, and which he avers and offers to prove, and also of the circumstances which he avers, and offers to prove, in order to establish that the said facts were *res noviter venientes ad notitiam*, with certification.

In consequence of that interlocutor a condescendence was given in by the Pursuer which was followed with answers, replies, and duplies. The Court thereupon, after hearing counsel on the 2d of February, 1819, pronounced an interlocutor, sustaining the verdict, and refusing the application for a new trial, &c.

The matter of the application for a new trial

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having been thus disposed of, the Court afterwards, on the 9th of February 1819, pronounced this judgment in the cause :

“ The Lords having advised the verdict of the
“ jury find the fact of adulterous connection
“ between the 1st day of January 1808, and 1st day of January 1812, is *not proven*, &c.

Upon the facts appearing in this additional case it was insisted, on behalf of the Appellant;

1st. That in the action against Mr. Bryson the very same point was at issue which was tried in the action of divorce, namely, the alleged adultery between her and Mr. Bryson during the same period of time, and on the same specific facts, attempted to be proved by the same witnesses who had been brought forward in the question of divorce out of which this appeal arises.

2d. That the trial in this action of damages was had in that Court, which is best fitted to investigate and pronounce upon all questions of fact ; that the Pursuer in that action examined all such witnesses as he chose to bring forward ; and in that trial the Defender obtained a verdict with expenses.

3d. That the application made by the Appellant for a new trial was made in the same division of the Court of Session which previously had under its consideration the question of divorce ; and though such application was pressed upon every ground of the verdict being contrary to evidence, and of *res noviter venientes ad notitiam*, the Court rejected such application for a new trial, with expenses in favour of the defender.

For the Respondent :

The presenting an additional case, stating matters which occurred subsequent to the appeal, is contrary to practice and to principle : The action of divorce and the action for damages are distinct processes pending in different Courts. If the Appellant had reason to object, as she did in the action for damages, against the introduction of the case and process in the Consistorial Court, the Respondent has equal reason to exclude the verdict and process in the Jury Court. The verdict of the Jury would have been inadmissible as evidence in the action for divorce. The Jury Court Act virtually excepts Consistorial Cases from its operation. If the verdict itself be excluded, the evidence on which the verdict was given is *à fortiori* excluded.

On the 23d of May 1821, the judgments of the Courts of Commissaries and of Session were affirmed without observation.

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SCOTLAND.

(COURT OF FREEHOLDERS AND OF SESSION.)

JAMES GIBSON, Esq. of Ingliston - *Appellant*.SIR WILLIAM FORBES, of Pitsligo, } *Respondent*.
bart. - - - - - }

The Scotch statute 1681, c. 21, directing that a roll of freeholders shall be made up according as the same shall be instructed to be, of the holding, extent and valuation in the act specified; and providing that the freeholders shall meet to revise the roll for election, &c. and giving jurisdiction to the Court of Session to determine objections against "any insertion in the roll;" Held in the Court of Freeholders and the Court of Session, and on appeal, that the freeholders have no authority, as to the holding, (although they may as to the extent and valuation,) to look beyond the titles produced to them by the claimant, or to receive evidence from the production of anterior titles, or otherwise, to show that the holding is different from that which is expressed in the *tenendas* clause of the charter, as that it is burgage where it purports to be bleneb-farm.

BY an Act of the Parliament of Scotland, passed in 1681, (c. 21,) reciting that great delay in the despatch of public affairs in Parliament, and Conventions of Estates, was occasioned by the controverted elections of Commissioners of Shires, provides that none shall vote in the election of commissioners of shires or stewartries, which have been in use to be represented in Parliaments and Conventions, but those who at that time shall be publicly infeft in property, or superiority in possession, of a forty-shilling land of old extent, holden of the King or Prince, distinct from the feu-duties in feu-

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lands, or where the said old extent appears not, shall be infest in lands liable in public burdens for his Majesty's supplies for 400 l. of valued rent, whether Kirk Lands, now holden of the King, or other lands holding feu, waird, or blench, of his Majesty, as king or prince of Scotland. The act directs that "a roll of freeholders shall be made up according as the same shall be instructed to be of the holding and extent or valuation aforesaid;" and provides, "that the freeholders shall meet at the head boroughs of the shires, &c. at the Michaelmas head court yearly; and shall revise the roll for election, and make such alterations therein as have occurred since the last meeting." Minute directions are then given as to the mode of proceeding, and the forms requisite in taking objections.

By another clause jurisdiction is given to the Court of Session. "In case objections be made (against any insert in the said roll) where a Parliament or Convention is not called a particular diet, shall be appointed by the meeting, and intimate to the parties controverting to attend the Lords of Session for their determination, who shall determine the same at the said diet summarily, according to law, upon supplication, without further citation."*

* By the Act 1427, c. 101, the Commissioners are to be elected by the "free tenants,"—"them, that awe compearance in Parliament and Council," out of whose "rentes" the expense of the Commissioner was, to be provided by contribution.

The Act 1457, c. 75, provides that "na freeholder that holdis of the king under the sum of twenty pounds be constrained to cum to the Parliament or General Council as for presence, but gif he be ane barroune, or els be specially warned," &c.

The Act 1503, c. 7, is to the same effect.

The Act 1587, c. 114, referring to the Act 1427, as to the election of Commissioners, provides that "Nane have voit in

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At the Michaelmas head court, held in October 1816, the Respondent gave in a claim to be enrolled as a freeholder of the county of Edinburgh.

“ their election bot sic as hes forty shilling land in free tennendcy
 “ holden of the king,” &c.; and that “ All freeholders be taxed
 “ for the expenses of the Commissioners of the shires passing to
 “ Parliament or General Councils, and letters of poynding or
 “ horning to be direct for payment of the summes tax to that
 “ effect,” &c.

The act 1661, cap. 35, reciting “ That diverse debates have
 “ formerly occurred, concerning the persons who ought and
 “ should have vote in the election of commissiouners, from the
 “ several shires of this kingdom, to Parliament, and who are
 “ capable to be commissioners to Parliament, and that it is ne-
 “ cessary for the good of his service that the same be cleared
 “ for the future (the King) doth therefore, with advice and con-
 “ sent of his estates of Parliament, statute, enact, and declare,
 “ that beside all heritors who hold a fourty shillings land, of the
 “ King’s majesty *in capite*, that also all heritors, liferenters, and
 “ wodsetters holding of the King, and others who held their lands
 “ formerly of the bishops or abbots, and now hold of the King,
 “ and whose yearly rent doth amount to ten chalders of victual,
 “ or one thousand pounds (all feu duties being deducted) shall be,
 “ and are, capable to vote in the election of commissioners of
 “ Parliaments, and to be elected commissioners to Parliaments;
 “ excepting always from this act all noblemen and their vassals.
 “ And it being just that those who shall be chosen, and accord-
 “ ingly shall attend his majesty’s and the kingdom’s service in
 “ Parliament, have allowance for their charges, his majestie
 “ doth therefore, with advice aforesaid, modify and appoint five
 “ pounds Scots of daily allowance to every commissioner from
 “ any shire, including the first and last days of Parliament, toge-
 “ ther with eight days for their coming, and as much for their
 “ return, from the farthest shores of Caithness and Sutherland,
 “ and proportionably at nearer distances; and that the whole
 “ freeholders, heritors, and liferenters holding of the King and
 “ prince, shall, according to the proportion of their lands and
 “ rents, lying within the shire, be lyable and obliged in the pay-
 “ ment of the said allowance, excepting noblemen and their
 “ vassals.” The act then concludes with a provision for defray-
 ing certain extraordinary expences which some commissioners of
 shires had then incurred, “ in providing of foot mantles for the
 “ riding of the Parliament.”—It was argued on the part of the
 Respondent that the phraseology of these statutes refers to the
 present investiture of the estate; and that whatever their ulti-
 mate right might be, those “ who hold” of the King for the time

In support of the claim of enrolment there was produced a charter of resignation under the great seal, dated at Edinburgh, 20th December, 1814, containing a grant by way of disposition and assignation from the magistrates and town-council at Edinburgh to the appellant, his heirs and assignees, of the superiority of certain lands described in the following terms:—"Totas et integras illas partes et portiones postea descript. terrarum vulgo vocat. "the Burrowmuir, alias the common muir, ad civitatem Edinburgensem pertinen. viz. totam et integram villam et terras de Greenhill uti eadem per demortuum Adamum Fairholm et ejus tenentes possessæ fuerunt, novemdecem acrarum plenæ mensuræ aut eo circa consisten. cum graminosis pratis infra medium dict. acrarum per demortuum Adamum Garden a diversis personis acquisit. et omnes per maceriam lapideam nunc inclusas parva parte ex australi orien. ejusdem jacen. excepta: Ac etiam totam et integram illam parvam partem dict. terrarum extra dict. maceriam cum fabrica ferrea super eandem posita, jacen. ex occidentali parte viæ publicæ ad locum vulgo vocat. Braidsburn conducentis: Ac etiam maneriei locum cum domibus, ædificiis, hortis, pomariis, columbariis, et omnibus et singulis pertinentiis prædict. terrarum, &c. jacen. infra parochiam de St. Cuthberts et vicecomitatum de Edinburgh."

The *quæquidem* clause describes the lands in question as formerly held of the Crown by and for the use of the town of Edinburgh.

being could not refuse to sustain their share of the burden imposed for defraying the expenses of the commissioner.

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The *tenendas* is in these terms: “ Tenend. et
 “ habend. dictas terras aliaque cum pertinen. supra
 “ script. *per dict. Dominum Gulielmum Forbes ejus-*
 “ *que prædict. DE NOBIS nostrisque regiis successori-*
 “ *bus immediatis legitimis superioribus earundem ut*
 “ *sequitur : viz. prædict. partes et portiones lie the*
 “ Burrow Muir, seu Common Muir, vocat. Green-
 “ hill, cum pertinentiis *in libera alba firma, &c.*

The *reddendo* for the lands of Greenhill is,
 “ Summam *unius denarii monetæ Scotiæ super fun-*
 “ dum dict. terrarum de Greenhill apud terminum
 “ Pentecostes annuatim *nomine albæ firmæ, si petatur*
 “ tantum, cum talibus ulterioribus seu alteris divoriis
 “ (si tales sint) in cartis in favorem Præpositi, Ma-
 “ gistratum et Communitatis civitatis Edinburgensis
 “ content.”

An instrument of sasine upon this charter, dated 2d March, 1815, was also produced; and it was shown, That the lands exceeded the sum of 400*l.* Scots; and for proof thereof the claimant referred to the valuation and cess-books of the county of Edinburgh, and to other competent evidence to be produced to the freeholders. The claim then concludes, “ that the said Sir William Forbes” being thus publicly infeft in lands holden immediately of the Crown, and of the valuation required by law, is entitled to be enrolled in the foresaid roll of freeholders of the county of Edinburgh, and hereby claims to be enrolled accordingly.

To the enrolling of the claimant it was objected by Mr. Gibson, of Ingliston (the Appellant) that the lands of Greenhill, composing a large proportion of the lands on which the claim is founded,

and described in the claimant's titles as all and whole, those parts and portions of the lands commonly called the Boroughmuir, alias the Common Muir, belonging to the City of Edinburgh, viz. the town and lands of Greenhill, &c., manor-places, houses, &c., lying within the parish of St. Cuthbert's and sheriffdom of Edinburgh, have always held burgage.

That, as parts and portions of the common muir, they are contained in the charters of the town of Edinburgh from the most remote periods; and according to the charter of confirmation and novadamus in the town's favour, dated 23d October 1636, which was proposed to the barons as the last investiture of these lands in favour of the resigners, and by which the claimant's signature was revised, they are held, along with the rest of the burgh, of the king, "in libera hæreditate et libero burgagio in perpetuum;" with a reddendo of 52 merks sterling "tanquam pro antiquo censu burgali content. in dicto infeoffamento dicti burgi concessio per regem Robertum primum ad duos anni terminos, &c. cum servitio burgi solet. et consuet*."

To which it was answered for the Respondent that the charter 1636 did not instruct the borough or common muir of Edinburgh to be of burgage-tenure; that it was a general charter, confirming all the old grants in favour of the city, and some of the lands were no doubt burgage, but a much more considerable part of the subjects in that

* The record of this charter, in the register of the great seal, was laid before the freeholders.

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charter, and the boroughmuir among the rest, are held blench or feu of the Crown; and the lands of Greenhill, in right of which Sir William Forbes claims, have stood separately rated in the valuation-books of the county as far back as any record reaches; and it is proved by the valuation-book that since 1726 Greenhill has paid cess and other county-taxes according to that valuation; while the subaltern rights of property have been uniformly made up after the form of a feu-holding, and the infeftments have been recorded in the county register.

These facts, as the Respondent contended, disproved the allegation that Greenhill was of burgage-tenure; but that it was sufficient to support the enrolment that Sir William Forbes produced a Crown-charter and infeftment in his favour, which were *ex facie* unobjectionable. Under these circumstances it was contended that it was incompetent for the freeholders to entertain any objection which required recourse to the warrants of the charter, and to the other old titles.

Questions were then put by the Appellant to the agent for Sir William Forbes:

“ 1st, Whether the Crown-charter of 23d October 1635, in favour of the town of Edinburgh, is
“ not the charter on which the claimant’s signature
“ (the warrant of his charter) was revised by the
“ Barons of Exchequer.

“ 2d, Whether the copy of the brief now produced is not a copy of the brief laid before the
“ Barons by the claimant at revising the signature.

The agent considering it to be irregular to put these questions to him declined answering them.

“ The meeting having considered the claim, productions, objections, answers and questions, sustained the claim, and enrolled the claimant accordingly.”

The objection against the Respondent's enrolment having been overruled in the court of freeholders without a division, the Appellant presented a petition and complaint to the second division of the Court of Session, under the authority of the statute 16th Geo. II. * praying the court to find that the freeholders of the county of Edinburgh did wrong in enrolling the Respondent, and therefore to ordain his name to be expunged from the roll.

In this petition and complaint the Appellant contended that the lands of Greenhill belonged to the community of the city of Edinburgh and were holden by that community inalienably in free burgage ; that consequently these lands were not truly holden by the Respondent in feu, ward, or blench, of his Majesty, in terms of the statute 1681, cap. 21., regulating the election of commissioners for shires ; and that the community of the city of Edinburgh could not “ by any species of juggle, either legal or political,” be permitted to throw its burgage-property into the mass of property holding in feu, ward, or blench, of his Majesty, and thereby extend the territorial basis of county representation, to the injury of the proper freeholders in their constitutional rights. To establish the proposition as to the tenure of the lands in question the Appellant referred to the terms of the Crown-charter, produced and founded

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* c. 11.

incapable of constituting the basis of qualification in the county of Edinburgh.

In his answers to the petition and the Respondent contended that the earlier support to the Appellant's objection might, and often did, hold subjects of feu-farm or blench-farm, as well as in the Respondent referred to the charter of King James VI. to the city of Edinburgh 16th of March, 1603, called by way of the "Golden Charter," as well as to the charter of Charles I. in 1636, to show that there was no presumption that the lands in question held burgage. He referred also to the records derived from the county cess-books, and contended that if the lands in question had been held burgage, they would have been entered in the cess-books of the burgh. For the same reason, he contended, they would not have appeared in the cess-books of the county. It being admitted, however, that the lands claimed on by the Respondent had at no time been entered in the burgh cess-books, but that they had constantly stood on those of the county, and paid cess to the county-collector, the Respondent contended that the lands were qualified for the county of Edinburgh.

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which the law holds to be necessary to establish a claim of enrolment, neither the freeholders, nor the Court of Session, sitting as a court of review on a matter brought before them, by a summary petition and complaint under the statute, could entertain any objections attempted to be supported by an investigation of the older titles.

These pleadings having been followed by replies and duplies, and the Court being of opinion that the Appellant's complaint was incompetent, without giving any opinion on the truth or relevancy of the Appellant's allegations on the import of the older titles, pronounced the following interlocutor: "The Lords having considered this petition and complaint, with the answers, replies, and duplies, and writs produced, and heard the counsel for the parties *viva voce*, find the said complaint not competent, and dismiss the same: find no expenses due, and decern."

Against this interlocutor the Appellant presented a short petition, and afterwards, with the leave of the Court, an additional petition, in which he endeavoured to remove the objection of incompetency, by contending that there was a distinction between questions regarding the right to the estate claimed upon, and questions regarding the nature and quality of the estate itself. In the one case, if the investiture is free from any *ex facie* defect, it is *jus tertii* to the court of freeholders, whether the estate on which the claim is framed may not be ultimately declared in a court of law not to belong to the claimant. If the titles exhibited by the claimant labour under no palpable objection, the freeholders are bound to admit him to the roll, without regard

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to any right of challenge which may be supposed to exist in favour of any third party. But where the objection arises not upon any ground of competition between different individuals, but upon a defect in the quality of the estate itself, every freeholder has an interest to insist upon such an objection, inasmuch as every fictitious addition to the general mass of freehold property is a virtual subtraction from the value of what is real freehold, and a consequent diminution of the constitutional rights of freeholders. The Appellant contended that the difference of interest in the two classes of objections was sufficient to establish a distinction between them; and he endeavoured to show, as well by a reference to the election statutes as by a review of the different decisions relative to the competency of objections to claims of enrolment, that there was neither reason nor authority for holding his complaint as incompetent.

In his answers to those petitions the Respondent contended that there was no room for the distinction stated by the Appellant. From a review of the statutes passed for the purpose of regulating the proceedings at meetings of freeholders, he contended that the freeholders were bound to give effect to the existing investiture in all its parts; and that they were no more entitled to proceed upon the supposition that the tenure ought to have been different from that which the investiture bore, than to contend that the investiture ought to have been in favour of another party than the claimant. He contended, that from the whole constitution and powers of the freeholders, as fixed by these statutes, they were as little qualified to investigate matters of tenure as to

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investigate any other matter of title beyond what appeared *ex facie* of the charter and infeftment produced. Nor was there any room for the distinction founded on the supposition that the freeholders had an interest in the one case which they had not in the other. If the interest of the freeholders to limit the numbers on the roll were held sufficient to authorize their interference, it would manifestly entitle them to investigate all objections tending to show that notwithstanding the subsisting investiture the ultimate right to the estate might be in another person than the claimant. That other person might perhaps be a nobleman, an unmarried woman, or otherwise disqualified from exercising the elective franchise. The Respondent further contended, from a review of the decisions relative to objections against claims of enrolment, that where the charter and sasine produced were *ex facie* liable to no objection, the court had in no instance sustained objections founded on the anterior titles. . . .

Upon consideration of these petitions, with the answers thereto, the Court, on the 16th December 1817, pronounced an interlocutor, refusing both petitions, and adhering to the interlocutor complained of.

Against the interlocutors of the Court of Session, dated 17th May and 16th December 1817, the Appellant entered an appeal.

*For the Appellant: **

The feudal right, resigned by the magistrates of Edinburgh into the hands of the Barons of the Ex-

* The argument upon the appeal was in substance the same as in the pleadings in the Court below.

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chequer, as the King's Commissioners, for the purpose of new infestment in favour of the Respondent, was the right holden by the resigners in free burgage, subject to the ancient burgal-census services and prestations. The acceptance of a resignation which implied or expressed a change of feudal tenure, or the *reddendo* due to the Crown was illegal and void.

By the statute 1681, c. 21, the freeholders at their head court are to make up, and to revise and alter, the roll for election, "according as" the estate forming the ground of claim shall be "instructed to be of the *holding*, extent, and valuation," required by the act. The Court, therefore, of Freeholders originally, and the Court of Session, by way of appeal, have express authority under the acts * to investigate and ascertain the holding or tenure of the lands in respect of which a freeholder claims to be enrolled; and if it be admitted, that where it appears possible or probable that an opposite claim may be made in respect of the same estate, there is no jurisdiction to inquire where the title is clear on the face of the deeds produced; yet the objection in this case does not proceed on a preferable right in a third party, but upon the allegation that the freehold on which the Respondent claims to be enrolled is non-existent; that his estate lies not in the county but in the borough of Edinburgh. This is a clear ground of distinction, and the authorities show that it is well founded.

But supposing that the freeholders have no authority to inquire as to the tenure, if the title-deeds (however falsely) allege or import a sufficient freehold, yet the real nature of the tenure by which

* 1681, c. 21, and 16 Geo. 2, c. 11.

the Respondent holds the estate in question is apparent on the face of the title-deeds produced by him ; and the freeholders ought either to have rejected his claim, or required further evidence of his title,

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In the charter, the lands are described as “ portions of the lands called the Common Muir, belonging to the city of Edinburgh.” They are declared to have belonged previously to the corporation, for the use of the community of the city, and to have been disposed and resigned by the provost and magistrates ; and the Respondent is thereby bound to pay a blench-duty of a Scots penny, “ together with such further and other duties (if any such there be) as are contained in the charters in favour of the city of Edinburgh.”

The presumption is that the lands were held by burgage-tenure ; if they were held by any other tenure the Respondent is bound to show it. Collateral Crown-rents and profits of the burgh, to be holden in feu-farm for a fixed annual payment, have been superadded in the grant of some of the old charters, as in that of 1603. But the territory was always held in free burgage, as appears by the whole series of charters, and particularly by the charter of 1636, which is the subsisting and regulating investiture of the royal burgh of Edinburgh, and the immediate warrant of the Respondent’s investiture.

For the Respondent :

The lands being expressly declared in the clause *tenendas* to be held by the Respondent blench of the Crown, the distinct and unequivocal terms of that clause cannot be affected by any expres-

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sions which may occur in other parts of the deed. The *tenendas*, as Mr. Erskine observes, is “that clause in a charter which points out the superior of whom the lands are to be holden, and the particular tenure under which they are to be enjoyed, whether by blench-farm, feu-farm,” &c. It is by that clause, therefore, that the proper tenure of the lands is regulated; and any expressions which may occur in any other parts of the charter must either be interpreted in conformity with that clause, or be held to have crept into it by mistake. But the charter in truth contains no expression inconsistent with the explicit terms of the *tenendas*. It nowhere describes these lands as lying within the city of Edinburgh, as having ever been liable in burgage-prestations, or as having ever been held by a burgage-tenure. It is no doubt true that the lands are described as having once belonged to the city of Edinburgh, and as having been part of the burrough-muir; but that circumstance by no means leads to the conclusion that the lands were held burgage. A burgh may hold lands of the Crown in feu-farm or blench-farm, as well as burgage; and it was accordingly admitted in the petition and complaint that many of the subjects contained in the charters in favour of the town of Edinburgh are held in blench-farm. The circumstance, therefore, of these lands which are situated within the county of Edinburgh having once belonged to the town, can afford no presumption that they are incapable of being held by the tenure so distinctly marked out in the *tenendas*.

Nor does such a presumption arise from the terms

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of the *reddendo*, which stipulates for the sum of a penny Scots “*nomine albæ firmæ, si petatur tantum*”
 “*cum talibus ulterioribus seu alteris divoriis (si tales*
 “*sint) in cartis in favorem præpositi, magistratum,*
 “*et communitatis civitatis Edinburgensis content.*”

Had these other duties been described to be the *census burgalis*, with *burgh-service used and wont*, it might have been contended that there was some inconsistency between the *tenendas* and the *reddendo*. But no allusion whatever is made to the payment of burgh-cess, to watching and warding, or to any other prestations which are peculiar to burgage-holding. There is not therefore any reason to presume that the other duties here referred to are at all inconsistent with the tenure described in the *tenendas*.

The Respondent having laid before the meeting of freeholders a charter and sasine *ex facie* liable to no objection, the freeholders did right in giving effect to that charter; and they were neither bound nor entitled to inquire into objections of any kind attempted to be established from the anterior progress of titles. The Appellant seems to admit the general rule, as laid down in Mr. Wight's treatise on elections, to be, “that the freeholders have no
 “right to call for the warrants of the charter on
 “which the infestment proceeds, or to object that
 “it is not conform to the signature, or to enter into
 “a discussion of a claimant's progress. His own
 “charter and infestment are all that they are concerned with; and if these are *ex facie* formal he
 “must be enrolled.” The Appellant however contends that this rule, though applicable to all

nor in the decisions pronounced within the jurisdiction of the freeholders that there is any room for the distinction claimed by the Appellant.

As to the argument, that by the clause of 1681, directing the freeholders of the stewardry to "make up a roll of all persons within the same," "according as he is instructed to be of the holding, and situation foresaid," the freeholders are directed to investigate fully the question, Whether the lands claimed on are truly of the holding by the law. The clause requires, not that the roll of any particular holding, but that the persons enrolled shall be of that holding. It is contended that the holding of lands is to be ascertained in any other manner than by the investiture, there can be no doubt that the holding is of the holding in which he is infeoffed. The freeholders are spoken of, the holding is the holding by the existing investiture. The act directs the freeholders to be enrolled as the same shall be instructed to be.

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necessary for enrolment, and which it has already been shown looks no farther than the existing investiture. It is absurd to suppose that the statute, in describing the duty of the freeholders in making up the roll, should require them to go beyond the qualification which in the preceding clause that very statute had pointed out as the warrant on which enrolment was to proceed. The provision that the roll should be made up as the qualifications of the claimants should be instructed, can therefore make no change whatever in the nature of that qualification, as being an existing investiture and possession under the King in feu, ward, or blench.

As to the argument founded upon the connection in the clause of the words, holding, extent, and valuation, that, as the freeholders are not limited to any particular instruments as evidence of the latter, they are as little limited with regard to the former; although by the Act 16 Geo. II. cap. 11, it is provided that no one can be enrolled in respect of the old extent of his lands, unless such extent is proved by a retour prior to 16th Sept. 1681, yet it perhaps cannot be contended that such a retour is in itself an instrument constituting the old extent. It may perhaps be regarded merely as evidence, in opposition to which contrary evidence may be received. Were such a retour regarded as an instrument constituting the old extent, the freeholders would unquestionably be limited to that instrument, and would not be at liberty to look beyond it, or to consider what the extent ought to have been. As to valuation, if the actual valuation is established by a decree of the commissioners of supply, which is

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liable to no *ex facie* objection, the freeholders are bound to give effect to that decree, and are not entitled to refuse enrolment on the ground that the lands claimed on ought to have been differently valued. So also in relation to the holding, the Respondent has already shown that it is constituted by the charter and infestment. The freeholders, therefore, cannot look beyond the instruments by which the holding is constituted, or enter into the question, What it ought to have been.

For the Appellant:—*Mr. J. P. Grant, Mr. W. Adam.*

The following authorities were cited:—*Dunbar v. Budge*, Dict. 8844, Elch. M. P. N° 36. *Scott v. Sutherland*, Dict. 8627. *Kames*, v. 3, p. 49, Fac. Dec. v. 1, p. 108. Elch. Dec. v. 2, p. 277. *Campbell v. Mure*, Dict. 7783. *Stewart v. Dalrymple*, Dict. 8579. *Abercrombie v. Alewood*, Fac. Coll. 17, June 1777. *Pirie v. Hay*, July 1777. *Sibbald v. Douglas*, Dict. 8857. *Carnegy v. Scott*, Id. 8858. *Wight*, 222. *Bell on Elect.* 238.

For the Respondent:—The *Attorney General* and *Mr. Wetherell*.

The authorities were principally the same as those cited for the Appellant: and also *Burn v. Adam*, Dict. 8852. *Adam v. Farquhar*, 4 July 1809. *Kibble v. Stewart*, 16 June 1814. *Montgomerie v. Ainslie*, May 23, 1821.

Judgment affirmed.

SCOTLAND.

(COURT OF SESSION.)

FORBES
v.
GIBSON.

SIR WILLIAM FORBES, of *Pitsligo*, } *Appellant*;
 baronet - - - - - }

JAMES GIBSON, of *Inglistone*, esq. - *Respondent*.

A SUMMONS in an action at the suit of a freeholder, praying that a charter and infestment may be reduced (absolutely), on the ground that the tenure has been unwarrantably charged from burgage to blench, for the purpose of giving persons qualification, cannot without limitation be sustained. *Semb.* that such freeholder has no title to sue unless the conclusion of the summons can be limited to the question of enrolment.

Whether the Court of Session has power to qualify the conclusion of the summons, and limit the reduction of the charter, &c. to the effect of excluding the party claiming under it from the roll of freeholders. *Quære.*

Supposing the reduction to be capable of being, and to be in fact so limited, whether the case does not fall under the provisions of the statute 16 Geo. 2, c. 11, s. 4, by which the period of bringing complaints is limited to four months. *Quære.*

Whether an action at common law to reduce the charter generally, or as conferring a freehold qualification, is competent after the lapse of four months from the time of enrolment. *Quære.*

AS soon as the interlocutors, dismissing the summary complaint mentioned in the preceding case, had become final in the Court of Session, the Respondent raised two actions of reduction against the Appellant, for the purpose of setting aside his charter and infestment. In one of these actions, Mr. Gibson, with certain other persons, pursue, in the character of a burghess of the City of Edinburgh, and as thus having a title and an inte-

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rest to prevent an alienation of property belonging to the burgh.

The other action was brought by Mr. Gibson in the character of a freeholder of the county.

The summons in this action, which is dated December 18, 1817, purports to be brought at the instance of “ James Gibson of Inglistown, esq. one
“ of the freeholders, electors of a commissioner to
“ represent and serve in Parliament for the county
“ of Edinburgh or Mid Lothian, and as such standing
“ upon the roll of the said freeholders, and so having
“ a substantial interest to prevent all persons not pos-
“ sessing the qualifications required by law, from
“ being enrolled on the said roll of freeholders, to
“ whose great hurt and prejudice the writings herein-
“ after called for to be reduced, are made, granted,
“ and expedite ; and, therefore, having good and un-
“ doubted right and title to raise, intent, follow
“ forth, and pursue the action of reduction under-
“ written.” The summons then calls for production of the Crown charter in favour of the Appellant, dated 20th December 1814, and the instrument of sasine following thereon ; and then sets forth the grounds and reasons of reduction.

The first reason of reduction sets forth in general terms, that the deeds sought to be reduced are false, improbative, and invalid. The second ground of reduction is, that although the lands of Greenhill are described in the charter and instrument of sasine as lying within the county of Edinburgh, they are truly situated within and are a part of the royal burgh of Edinburgh ; and in support of this assertion, reference is made to the

charter granted by Charles I. dated 23d of October 1636. The third ground of reduction is, that the holding in the charter and sasine sought to be reduced has been unwarrantably altered from bur-
 gage to blench. And the fourth ground is, “ that
 “ such an alteration of the holding is contrary to
 “ the Act 6th of Queen Ann. chap. 26, intituled,
 “ ‘ An Act for settling and establishing a Court of
 “ ‘ Exchequer in the north part of Great Britain,
 “ ‘ called Scotland,’ and by the former commis-
 “ sions, and former law and practice therein re-
 “ ferred to and recognized, it is not lawful or
 “ warrantable for the Barons of our Exchequer to
 “ receive resignations, or to pass signatures, unless
 “ according to the form and tenor of the former
 “ infeftments, and for payment to us and our royal
 “ successors of the rents and services therein ex-
 “ pressed ; as the said Act of Parliament, and said
 “ commissions therein referred to, more fully pur-
 “ port. Whereas the said charter, and the signa-
 “ ture whereon it appears to have been expedite, are
 “ altogether and essentially disconform to the tenor
 “ of the former infeftments, whereon the pretended
 “ resignation of the said lands of Greenhill pro-
 “ ceeded, and the same must have been obtained by
 “ the defender *per obreptionem*, of us and our said
 “ barons, contrary to and in express violation of the
 “ powers and instructions under which alone they
 “ act in the discharge of that branch of their
 “ official trust and duty.”

The conclusion of the summons is in the following terms : “ And therefore, and for other reasons to be
 “ proponed at discussing, the said charter called for,

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“ with the signature and precept on which the same
“ proceeded, and infestment thereon, with all that has
“ followed or may follow upon the same, ought and
“ should be reduced, rescinded, retreated, cassed,
“ annulled, decerned, and declared by decreet of
“ our Lords of Councail and Session to have been
“ from the beginning, to be now, and in all time
“ coming, *void and null, and of no avail, strength,*
“ *force, or effect in judgment,* or outwith the same
“ in time coming.

By the statute 16 Geo. II. chap. 11, sect. 4, the term for bringing complaints against the enrolment of freeholders is limited to four months. And the same statute farther provides, “ that if no such
“ complaint shall be exhibited within the time
“ aforesaid, the freeholder enrolled shall stand and
“ continue upon the roll until an alteration of his
“ circumstances shall be allowed by the freeholders
“ at a subsequent Michaelmas meeting, or meeting
“ for election, as a sufficient cause for striking or
“ leaving him out of the roll.” The Appellant contended, that as it was the object of this action to defeat his right of enrolment, it was not competent, as not having been brought within the four months prescribed by the statute, and farther, that, independently of this objection, the pursuer, as one of the freeholders standing upon the roll, had no proper title and interest to insist in an action for reducing and setting aside the charter and infestment called for; that such an action, at the instance merely of a freeholder, was unprecedented; and, were a precedent for it to be now established, every freeholder would be exposed to be called upon to

produce the whole progress of his title deeds, and to lay open his charter-chest, at the pleasure of any other freeholder who might choose to institute an action of reduction. He farther maintained that the action was groundless upon the merits.

The Lord Ordinary having heard parties' procurators on the preliminary defence that the pursuer has no sufficient title to insist in the present action of reduction of the defender's charter and sasine, and having considered the process, and seen the proceedings in the former petition and complaint, and attended to the interlocutors of the court, by whom the complaint was dismissed as not competent on the 29th of May 1818, repelled the objection to the pursuer's title to insist in this action of reduction.

Against this interlocutor the Appellant gave in a short representation which the Lord Ordinary refused, and adhered to the interlocutors represented against.

The Appellant then presented a full representation; and, upon advising the same with answers, the Lord Ordinary pronounced the following interlocutor: "The Lord Ordinary having considered
 " this representation, with the answers thereto, and
 " whole process, finds that the pursuer has a sufficient title to insist in the present action for
 " reducing the defender's title, in so far as the
 " pursuer is interested as one of the freeholders,
 " standing on the roll of freeholders of the county
 " of Mid Lothian as libelled, to reduce the defender's said titles; and with this explanation
 " refuses the desire of the representation and adheres
 " to the interlocutor represented against."

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Against these interlocutors of the Lord Ordinary the Appellant presented a reclaiming petition to the second division of the court. When the petition came to be advised, with answers, the Judges being unanimously of opinion, that the question of title was one of great importance, appointed a hearing of counsel to take place in their presence.

May 19, 1820. After this hearing had taken place, the Judges of the second division of the court delivered opinions to the effect of sustaining the title to pursue, and accordingly pronounced an interlocutor, refusing the petition, and adhered to the interlocutors complained of, reserving all questions as to expenses.

These judgments being supposed to be interlocutory in their nature, the Appellant obtained leave * to appeal; and accordingly appealed against them.

For the Appellant :

The action is in substance to remove the Respondent from the roll of freeholders, and not having been commenced within four months from the enrolment, it is by the provisions of the 15 Geo. II. c. 11, s. 4, rendered incompetent; and

* By the Act 43d Geo. III. c. 151, intituled, "An Act concerning the administration of justice in Scotland, and concerning appeals to the House of Lords," it is, *inter alia*, enacted, (sect. 15.) "that hereafter no appeal shall be allowed to the House of Lords from interlocutory judgments, but such appeals shall be allowed only from judgments or decrees on the whole merits of the cause, except with the leave of the division of the Judges pronouncing such interlocutory judgments; or except in cases where there is difference of opinion among the Judges of the said division."

the Court of Session has no ordinary or common-law jurisdiction upon the subject.

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On this first defence there is no express finding in the interlocutors. But as no party can have a title to insist in an incompetent action, the interlocutors sustaining the title to pursue, do in effect overrule the objection to the competency.

The statute 16 Geo. II. c. 11, s. 4, while it confers upon any freeholder standing on the roll the right of complaining against any enrolment “within four calendar months” after it takes place, provides, on the other hand, “that if no such complaint shall be exhibited within the time aforesaid, the freeholder enrolled shall stand and continue upon the roll, until an alteration of his circumstances be allowed by the freeholders at a subsequent Michaelmas meeting,” &c. Supposing the action to be directed (as it has been represented by the Respondent, and regarded in the interlocutor of the Lord Ordinary) merely against the Appellant’s enrolment, or his right to continue upon the roll, the question is, whether such action can be competently brought, after the statutory period for agitating complaints relative to enrolment has expired.

The statutory period had elapsed before the present action was brought. The Appellant’s enrolment took place on the 1st of October 1816. But the present action was not raised until December, 1817.

The Court of Session has no original jurisdiction in questions of enrolment. When the right or duty of freeholders was that of attending parlia-

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ment in person, it does not appear that there was any ordinary or original jurisdiction in any court, excepting parliament itself, by which any person could be compelled to exercise, or be restrained from exercising, that right or duty.

The statute declares, “ that no other objection
“ shall be competent in parliament or convention,
“ but what shall be contained in the instruments
“ taken as thereby provided. And in case objec-
“ tions be made when a parliament or convention is
“ not called, a particular diet shall be appointed by
“ the meeting, and intimate to the parties contro-
“ verting, to attend the Lords of Session for their
“ determination ; who shall determine the same at
“ the said’ diet summarily according to law, upon
“ supplication, without further citation.”

This statute, then, so far from recognizing any ordinary jurisdiction in the Court of Session as to the political right of voting for a representative in Parliament, constitutes only a very special and limited authority in that court—an authority meant to be exercised only “ in case objections be made when a
“ parliament or convention is not called.”

The act 16 Geo. II. chap. 11, makes no allusion to any such ordinary jurisdiction. The only check which it provides against improper enrolments, is the summary complaint to be brought within four months after the date thereof ; and the same statute declares that in the event of no complaint being brought within that period, the freeholder enrolled shall have a right to remain upon the roll, until an alteration of his circumstances shall take place.

The avowed object of the action is to obtain a

judgment that the appellant ought not to stand upon the roll : or, in other words, to obtain a warrant for expunging his name from the roll. But no alteration whatever has taken place in the circumstances of the Appellant ; and, therefore, no proceeding can be competent, of which the sole purpose is to prevent the Appellant from continuing on the roll. Such a proceeding as the present is incompetent, not only because there is no authority for an action of this sort in the Court of Session at all, *i. e.* an original ordinary action of reduction or declarator relative directly to the right of a freeholder continuing on the roll ; but because, at any rate, if it be supposed that, by equitable interpretation, an action might be admitted in a form not precisely warranted by the statutes, this at least must not be so done, as to defeat so important a regulation as the limitation of four months, and the security given to persons who have remained on the roll without challenge during that period.

This limitation would be altogether nugatory, were it found competent to institute after the lapse of the four months, a summons of reduction instead of a summary complaint. Were such actions found competent, all those parties who in times past have neglected to complain within the four months, would be empowered to bring forward their challenge in the form of an action of reduction.

As this is the first attempt to challenge directly the right of a freeholder to remain upon the roll through the medium of an ordinary action, the Appellant cannot refer to any previous judgment pronounced in such an action. But the decision in

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the case of *Anstruther Easter**, though it related to burgh politics, strongly supports the principle that a statutory limitation with regard to the time within which the challenge of a vote is competent, cannot be evaded by the device of bringing that challenge in the form of an action of reduction.

Assuming that the decision of the Court of Session in the summary question is well founded, the effect must be that the Appellant has a right to continue upon the roll until there shall occur such an “alteration of his circumstances,” as the law holds sufficient for striking him off.

The question is, whether such alteration of circumstances can be effected in the manner here attempted by the Respondent. If the Appellant had conveyed away so much of the lands upon which he is enrolled as to reduce the valuation of the remainder below the legal standard, or the officers of the Crown had reduced the charter and infestment thereon, on the ground that the Crown had been illegally deprived of its just rights by an improper change of the holding, or otherwise, an alteration of circumstances would have occurred, entitling the respondent, or any other freeholder, to insist that the Appellant should be struck off the roll. In like manner, if a reduction had been successfully brought by the corporation of the city of Edinburgh, on the ground of the conveyance in the Appellant's favour having been fraudulently obtained; or even at the instance of any individual who considered his own right to the subjects conveyed preferable to that of the Appellant; any freeholder upon the roll would

* D. P. 1767. Wight on Election, vol. 1, p. 338, *et seq.*

be at liberty to produce the decree in such reduction as a warrant for striking the Appellant off the roll, in respect of an alteration in his circumstances. Such alteration cannot be produced by an action of reduction, the purpose of which is to investigate the anterior titles of the freeholder, who has produced at the freeholders court an investiture *ex facie* valid.

The Respondent's present attempt is unprecedented, and repugnant to those principles which have always hitherto been held to regulate the title to pursue reductions of a feudal investiture, and beyond those limits within which the power of investigation as to disputed enrolments is by law confined.

It is impossible to interpret the expressions of the summons as concluding for any thing short of a total reduction of the feudal investiture by which the Appellant holds his estate. It does not very clearly appear what is meant to be the effect of the qualified judgment of the Lord Ordinary. But it is impossible to find the charter and infestment partly null and partly valid. So long as the charter subsists to the effect of enabling the Appellant to hold the lands therein contained, it must also enable him to maintain his place upon the roll. So long as the charter remains, the tenure in that charter must remain also. It is in vain to contend that the tenure ought to have been different from that which the charter contains. The charter does not merely afford evidence as to the nature of the holding. It in fact constitutes that holding; and it is impossible to find that the tenure is different from that which the charter sets forth. So long, therefore, as the charter remains

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unreduced, the lands in question must be held blench of the Crown; and, while that holding continues, it is in vain to contend that the Appellant, who has in all other respects the qualification required by law, shall be expunged from the roll. So long as the charter and infeftment subsist, the Appellant has the qualifications required by the statute 1681, chap. 21. He in particular has the qualification of a public infeftment in lands, "holding feu, ward, or "blench of His Majesty;" and to ordain him to be turned off the roll, while that qualification continues, would be to act directly in the face of the provisions of that statute.

Even supposing that the conclusions of the present action could be modified, it cannot be proceeded in without laying open the whole progress of the title-deeds, at least so far back as the charter 1603. Supposing the investigation demanded by the Respondent to take place, it is only by a laborious search into the titles, so far back as they can be traced, that there is any chance of ascertaining what has all along been the holding of the lands in question. But the law does not on slight grounds allow a charter-chest to be laid open. A party who challenges the subsisting investiture of an estate, is bound to show that the effect of setting aside that investiture will be to vest the estate in himself, or in those for whom he acts. A reduction on the head of death-bed can proceed only at the instance of the heir at law, because he would succeed in the event of the death-bed deed being set aside. If a conveyance has been granted on the eve of bankruptcy to the prejudice of the creditors on a sequestrated

estate, the trustee on that estate can alone challenge it by reduction ; because he alone, in the event of obtaining decree of reduction, has the title to recover the subject fraudulently conveyed away, and to make it available as a fund of division among the creditors. In like manner, in almost every other case where a challenge is brought, the title to pursue must be founded on a service general or special, according to the situation of the subject in dispute, or upon the right of apparency ; so as to satisfy the Court, in the first instance, that the effect of the reduction being successful will be to vest the subject of it in the pursuer. Even where a challenge is brought by a remote substitute in an entail, the same principle is not lost sight of. If the object of the action is to recover lands alienated in defraudation of the entail, the effect of it is to vest these lands in the heirs of entail, of whom the pursuer is one, and whose interests, therefore, he is entitled to protect ; and if the action infers an irritancy, so as to put the estate past the present possessor, the effect of the challenge clearly is to bring the succession nearer to the pursuer than it would otherwise be.

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But no freeholder is entitled, merely in that capacity, to demand inspection of the warrants on which a charter proceeds. In all the statutes, from 1427, c. 101. downwards, the qualification of persons claiming enrolment is made to depend on the present possession and investiture of the feudal estate. The act 1681 confers the privilege particularly on those “ who at that time shall be publicly infeft ” in lands “ holding feu, ward, or blench of his

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“ Majesty.” Every freeholder is entitled to require that the actual investiture shall be ascertained ; but (that investiture being constituted by charter and infestment) the production of these, and the mid-couples, if any, necessary to show the claimant’s connection with them, are all that any freeholder can require.

If it be admitted, that a freeholder cannot interfere so far as relates to the dispositive clause in a charter, on what principle can he be entitled to interfere with regard to the clause *tenendas*, or the clause *reddendo* ? These clauses are just as essential to the charter and infestment as the dispositive clause.

There is no foundation for the distinction taken by the Respondent between the power to investigate the titles of individuals upon a competition or adverse claim, and the power to investigate the nature of the tenure. In either case the freeholders cannot look beyond the subsisting investiture.

If it were so, burgage holding does not, or at least did not, constitute a separate manner of holding, but was a species of ward holding ; with this only difference, that in a proper ward holding, the vassal is a single person, whereas in a burgage tenure it is a community*. The objection therefore is, not against the quality of the estate itself ; for lands held ward of the Crown are of the tenure required by the act 1681 ; but the objection is, that the real vassal is disqualified from voting in county elections, and that the estate claimed on is represented by the member for the burgh. It is an

* Craig, lib. 1, dieg. 10, s. 31 & 36. Erskine, book 2, tit. 4, s. 8.

objection precisely of the same kind, as the objection that the estate claimed on truly belongs to a peer, and therefore cannot be made the basis of county representation. But in both cases the answer is insuperable, that the freeholders are entitled to look only to the actual investiture, and have no right to attempt to penetrate into the anterior titles.

Nor is the case without remedy, for supposing the *tenendas* and *reddendo* in the charter to have been improperly altered, the Crown would have a title and interest to institute a reduction. The Commissions of Exchequer prior to the union contain instructions under which the Barons of the Exchequer are still bound to act, in granting new donations and dispositions. One clause in the commissions directs that lands, to be given out from the Crown in future, should continue to be held “*secundum formam et tenorem antiquorum infeofamentorum, ac solvendo census et præstando alias conditiones inibi expressas.*” So if the corporation has been illegally deprived of an estate formerly belonging to it, the corporation may bring a reduction, in order to set aside the conveyance, by which it has been aggrieved ; or it is even possible that an individual burgess may be entitled to complain, provided he can show that his interests have been affected by means of an illegal act.

As to the argument that this is a question of public law which requires that the holding in a charter shall not be changed, how is it more a matter of public law, than that an estate held under a strict entail shall not be alienated, or that

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property belonging to a peer shall not confer a right to vote in county elections?

It has been alleged, that those laws which prohibit salmon-fishing at certain times of the year, or with machinery of a certain description, were intended for the benefit of the community; and it was further said, that upon the same principle on which an upper heritor in a river may challenge such illegal modes of fishing, the Respondent may institute a reduction of the Appellant's charter and infestment. But the principle on which an upper heritor in a river is allowed to interfere, is, that his own private rights in the salmon of that river are directly invaded, and that he would thus have a title and interest to pursue, even although the public interest was not at all affected.

There is no authority for holding, that where the title to pursue is called in question, it can derive the smallest support from the circumstance that the act challenged is alleged to have been done in violation of the public law. No party, not having otherwise a proper title and interest to state the objection, can proceed on the ground that the public law has been violated*.

The case supposed, that by a false description in the charter, a person, whose estate is situated in one county, might claim enrolment in another, is different. The freeholders have always the means, by

* *Lord Galloway v. Burgesses of Wigton*, Feb. 10, 1631. Dict. 7835. *Colt and others v. Town of Musselburgh*, 9th Jan. 1756. Dict. 7782.

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reference to the valuation-roll, of ascertaining whether or not the lands are within the county. It is incumbent on the claimant to show that the lands claimed upon are rated in the valuation and cess-books of the county to which the claim applies. Unless the claimant can point out the lands claimed on in the valuation-books of the county, the freeholders are entitled to refuse enrolment, or to apply by petition and complaint to the Court of Session, in order that the claimant, who may have been admitted under such circumstances, may be struck off the roll. Accordingly, in the case of *Abercromby v. Alewood**, the Court of Session, upon a summary complaint, ordered the claimant's name to be expunged, upon this ground, *inter alia*, that the lands claimed upon had always paid cess to the burgh of Banff, and did not appear at all in the valuation or cess books of the county.

It is true, that where a claim of enrolment is founded upon the old extent as ascertained by a retour prior to 1681, the freeholders are entitled to look into the anterior progress. But in that case the anterior titles may be examined, not for the purpose of cutting down the subsisting investiture, but merely in order to ascertain whether the lands vested in the claimant are truly the lands to which the retour applies. By the act 16 Geo. 2, c. 11, the only evidence of the old extent which can be admitted is a retour dated prior to the 16th of September 1681. It is incumbent on the claimant to establish the identity of the lands contained in his charter with those contained in the

* June 17, 1777.

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retour. The identity of the description will in general be sufficient for that purpose; but if any objecting freeholder is able to trace from the record any part of the lands in the retour into the possession of other parties than those through whom the claimant has received his right, it will then be necessary for the claimant to obviate that objection, by tracing that part of the lands back again into his own person or that of his authors.

The latitude which has been allowed to freeholders in challenging decrees of commissioners of supply in dividing *cumulo* valuations, has no connection with the question of feudal investiture.

If the title of the Respondent to insist in this action were to be ultimately sustained, there is scarcely any estate in Scotland of which the title deeds may not be laid open, upon pretences similar to those upon which the present action proceeds.

For the Respondent:—The single point under discussion is the title of the Respondent to reduce, by an ordinary action at law, the deeds by which the Appellant has obtained admission to the roll of freeholders for the county of Edinburgh.

Lands held burgage afford no qualification for a vote in the election of a member for a Scottish county. According to the statute 1681, none can vote at such elections but those who are infeft in property and superiority, and in possession of a forty-shilling land of old extent, or infeft in and
“ liable in public burdens for his Majesty’s supplies,
“ for 400*l.* of valued rent, whether kirk-lands now
“ holden of the King, or other lands holden feu,

“ward or blench of his Majesty, as King or Prince
“of Scotland.”

The Respondent undertakes to establish in the
action of reduction, 1st, That the lands in question
were burgage-lands; 2d, That the tenure was changed
from burgage to blench, by the charter of resignation
forming part of the Appellant's titles; and, *lastly*,
That such change was incompetent and unlawful; so
that the lands are still in every question regarding
elective franchise, to be considered as burgage, and as
forming no part of the property in the county of Edin-
burgh entitled to vote at county elections.

According to Wight* “It has become a
“pretty common practice for the royal burghs to
“allow part of their burgage-lands to be held feu
“of themselves. But even although, after doing
“so, they were, by connivance, to convey the supe-
“riority to a purchaser, so as to make way for his
“obtaining a charter from the Crown, that would
“not confer upon him a right to vote, or entitle
“him to be enrolled as a freeholder. The lands
“still remain truly burgage, and their owners are
“represented by the member for the burgh.”

According to Bell,* “Where a burgh has
“feued out part of the common property of the
“burgh, to be held of the burgh in feu; and where,
“afterwards, in order to give a freehold qualifica-
“tion to the feuar, the steps necessary for acquiring
“a Crown holding have been connived at, still the
“right thus constituted over burgage property is
“incapable of holding a freehold qualification; for

* Law of Elect. p. 209.

† Law of Elect. p. 72.

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“ this plain reason that the subject is truly burgage,
“ and is already represented in Parliament.”

According to these opinions, the measure by which the tenure of the lands in question has been apparently changed from burgage to blench, constitute a fraud, by which lands, incapable of affording a freehold qualification, have been converted into property *ex facie* conferring that franchise ; and by which, as affording such apparent title, a person has been admitted to the roll who is as destitute of qualification as if his property were situate in another country.

The title of a freeholder to reduce these deeds is unquestionable. The requisites for sustaining a legal and complete qualification may be classed under two general heads ; 1st, Titles of property *ex facie* valid, that is an unobjectionable charter and sasine ; and, 2d, That the lands contained in the charter and sasine are of the value, situation, and character capable of legally conferring the elective franchise. Thus, although a person is vested with certain lands, by an unobjectionable charter and sasine, it is absolutely necessary, in addition, that the lands so vested should be of the valuation required by law, and should be situate within the county. Now, under the last head of requisites, the Respondent maintains, and indeed the Appellant seems to admit, must be included the tenure under which the lands are held, as being feu, ward, or blench of the King. And it seems to follow, by necessary consequence, that a freeholder must have a title to set aside deeds, by which this last-men-

tioned requisite, the proper tenure has been attached to lands which he undertakes to prove are incapable of receiving it: by which, lands held burgage have been converted into blench or feu, contrary, as he maintains, to their inherent and legal incapacity of admitting such a change of character. Every freeholder is intrusted by law with the guardianship of the purity of the roll, and is, of course, entitled to challenge and prevent every attempt to attach that right of admission, which the law exclusively limits to estates of a particular class and extent, to one defective in either requisite. In a certain class of cases, where the matter falls strictly within the cognizance of the court of freeholders, and where the injury arises from the erroneous decision of that court upon points properly within their cognizance, the interest is protected, and the freeholder's title exercised in the form of a summary petition and complaint to the Court of Session. But it is perfectly well known, that, from the most obvious considerations of expediency, the court of freeholders is only vested with a limited jurisdiction, or rather with a limited power of inquiry; and, where the wrong done either lies beyond their jurisdiction, or demands an investigation, which their power of taking proof does not reach, any freeholder has an interest, and a legal title, to obtain redress, by instituting an action at common law, in the form proper for that purpose. Accordingly, the title of a freeholder to institute such actions has been frequently recognized in cases exactly analogous to the present. It has been already mentioned, as one of the

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requisites for sustaining the freehold qualification, that the lands should be of the valuation fixed by law. In the court of freeholders, the only evidence which can be demanded, and which they are bound to receive, is that afforded by the cess-books of the county, and the decreets of division pronounced by the commissioners of supply, in cases where the division of property has rendered necessary a new apportionment of the valued rent. It is quite undeniable, that, in the court of freeholders, and in the Court of Session, sitting in review of their judgments, by petition and complaint, decreets of division by the commissioners of supply are held *probatio probata* of valuation, against which no objection can be received. But although this evidence is beyond the reach of challenge of the court of freeholders, it is now fixed law, that any individual freeholder may bring an ordinary action at law for setting aside those decreets, and may, by thus establishing the defects of the evidence of valuation, ultimately procure the expulsion of the claimant from the roll. This point was decided in the cases of *Ross v. Mackenzie*,* and *Earl of Fife v. Duke of Gordon*;† which decisions have generally been understood as removing all doubts as to the freeholder's title to reduce. According to Wight‡. It has, been doubted, whether an action of this sort be “competent to a freeholder who has no interest “in challenging a decision but to support objections “to the enrolment of others. But when that “point came to be warmly debated, and deliberately

* March 10, 1774.

† June 16, 1774.

‡ Wight, p. 185.

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“ considered, in a question from the county of In-
 “ verness, the Court of Session sustained the title,
 “ and repelled the objection. A similar judgment
 “ was pronounced in a question between the Duke
 “ of Gordon and the Earl of Fife. It is true, that,
 “ in that case, one of the pursuers had an undoubted
 “ right to challenge the decision, being himself
 “ immediately affected by it.” But the court sus-
 tained the title of the pursuers in general, although
 the rest had no such interest. And, since that
 period, reductions of decreets of division of valua-
 tion, at the instance of a freeholder, having no
 other interest, have become common, and the
 title is now universally allowed to be unchal-
 lengeable.

The same inference may be drawn from another
 decision in the case of the *Earl of Fife v. Gordon*,*
 where the title of an individual freeholder was sus-
 tained, to establish, in an ordinary action at law, an
 objection against a freehold qualification, which did
 not fall within the jurisdiction of the court of free-
 holders.

The judgment in that case is decisive of the pre-
 sent question. The sasines there in dispute were
ex facie complete and valid ; and the date of regis-
 tration appearing upon them was as much beyond
 challenge in the court of freeholders as the de-
 scription of the tenure in the present case ; yet
 there the title of a freeholder to insist in an action
 of declarator, that the apparent date was not the
 true date, was sustained ; and was sustained, al-
 though the claimants had been rejected, for the

* Morison, 8850. July 8, 1774.

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purpose of enabling the opposing freeholder to support what would otherwise have been untenable, the rejection of those claims of enrolment.

From these numerous cases, the Respondent is entitled to assume, that the legal title of a freeholder is not limited to that which he may exercise by petition and complaint; but that, on the contrary, he has, at common law, a legal title and interest to maintain and prosecute actions for obtaining redress against invasions of the purity of the roll, which neither the freeholders sitting as a court, nor the Court of Session, sitting in review of their proceedings, could possibly take cognizance of. Indeed so far from this latter circumstance excluding his interest, it is precisely the incompetency of applying for redress by petition and complaint, which, in the case of decret of revision, and others of the same kind, establishes his undoubted legal interest to insist at common law in actions of reduction. When a freeholder may legally state an objection either to the title or valuation of a claimant in the court of freeholders, or in a petition and complaint to the Court of Session, it might be main-

seems quite clear that the title of a freeholder must be sufficient to entitle him to establish those defects in the ordinary course of law.

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That the court of freeholders, and every individual freeholder appealing from their judgment, by petition and complaint, is limited to the actual existing investiture, and cannot inquire into the preceding titles, may be admitted. But that limitation cannot apply to cases where the object of the freeholder is to ascertain, by an action at common law, that the actual existing investiture, though apparently conferring a qualification, is not really entitled to that effect. Although the court of freeholders may be bound to hold the charter and sasine presented to them, as *probatio probata* of the tenure, just as they were bound to admit a decret of division as *probatio probata* of valuation; and they may no more be entitled to investigate the anterior titles in the one case than they are entitled to investigate the anterior rates or valuations of the different portions of land upon which the decret of division rests, yet if, in the latter case, there is a power in an action of reduction at common law to reach these anterior calculations, and to rectify the error thus proved to exist, the Respondent, holding precisely the same interest, must have a title to correct an error equally fatal, being the substitution of a tenure which the lands were incapable of receiving; and to prove the existence of that error, from the anterior titles, just as the error of the decret of division is proved, by the reference to what was equally beyond the cognizance of the freeholders,

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the apportionment of the valuations and calculations upon which the decret of division rested.

Where attempts have been made to challenge titles of enrolment, on the ground that they were acquired from persons holding under entails, or otherwise under inability to convey, the plea of *jus tertii* has been sustained.

But the objection here is totally irrelevant ; and the subject of reduction does not at all fall within the class of cases where *jus tertii* can be pleaded. The Respondent does not deny the Appellant's right to the lands, or the efficacy of the conveyance by which he acquired it. But, to warrant enrolment, evidence is necessary, not only of the claimant's right, but proof that the lands are of the situation, value and legal character required by law. It is their defect in this last quality, which it is the object of the present reduction to establish. The Respondent does not deny the right of the Appellant to those lands ; but he maintains that their tenure is *burgage*, and the object of the reduction is to set aside the deeds by which they appear to be held *blench*. Here, then, the injury which it is the object of the action to redress, is, that, by the deeds sought to be reduced, a freehold qualification has been attached to lands, which, from their nature, are incapable of affording it ; and it seems in vain to maintain, that such an objection as this comes under the objection of *jus tertii*, any more than an objection founded on the lands being beyond the county, or not possessing the valuation required by law. In all these cases, the objector challenges not the right of the

claimant to the lands, but the capacity of the lands to afford a vote ; and, accordingly, where such cases have occurred, the title of the objector to reduce the deeds by which an apparent qualification has been attached to the lands, has been uniformly sustained.

If it be true, as contended by the Appellant, that lands held burgage are under no inherent disability of being changed into feu or blench holding ; and that their incapacity of affording a vote arises only from the disqualification of the burgh that holds them, and ceases upon their transference to persons not so disqualified, as in the illustration offered by the Appellant ; the Respondent might have no interest to prosecute the action, because these suppositions tend to prove that the action itself is unfounded. But, in trying the question of title, the Respondent undertakes to make out that these propositions are false. He maintains, that lands held burgage are legally disqualified from affording a freehold qualification. That this does not arise merely from the disqualification of the burgh ; but, to use the words of Mr. Wight, that ‘ though royal burghs ‘ were, by connivance, to convey the superiority to a ‘ purchaser, so as to make way for his obtaining a ‘ charter from the Crown, that would not confer ‘ upon him a right to vote, or entitle him to be ‘ enrolled as a freeholder. The lands still remain ‘ truly burgage, and their owners are represented by ‘ the member for the burgh.’ In trying the question of title, then, it must be assumed that the grounds of the action may be established ; and it is a violation of the rule of pleading to attempt to question the

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title by denying the grounds of the action. The objections thus urged by the Appellant, may, if ultimately ascertained to be well founded, sustain the Appellant's defence ; but he cannot now plead them in bar of the Respondent's title. To render the case of the lands held by a Peer, or lands held under an entail analogous to the present, the supposition ought to be made, that lands once held by a Peer, or once subjected to the fetters of an entail, should, by public law, be rendered incapable of ever affording a freehold qualification : on which supposition there cannot be a doubt, that any freeholder would have a legal title to reduce the deeds, by which their inherent disability was disguised, and by which they received the semblance of lands capable of affording the elective franchise.

The supposed danger of disclosing a title is imaginary. Such cases must necessarily be few, where any attempt is made to convert lands, properly burgage, into lands held feu of the Crown. Such a change can only be attempted to serve political purposes ; and when it is attempted, its detection cannot justly be made the subject of complaint. As to the alleged hardship of extinguishing the rights of property held by the Appellant, upon a mere objection urged by a freeholder to its sufficiency as affording a vote, it seems to be guarded against by the qualification contained in the Lord Ordinary's interlocutor, ' That the Pursuer has a sufficient title to insist in ' the present action for reducing the Defender's ' title, in so far as the Pursuer is interested as one of ' the freeholders, standing on the roll of freeholders ' of the county of Mid-Lothian, as libelled, to re-

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‘duce the Defender’s said title.’ But even if this qualification were ineffectual, and if the consequence of the reduction were the extinction of the Appellant’s feudal title, it could afford no objection to the Respondent’s legal interest to prosecute this reduction. As the Appellant has chosen to make these rights the ground of a claim of enrolment, they must be exposed to the risk of challenge, upon any ground competently urged by a freeholder against their effect ; and the right of such freeholder cannot be impaired or excluded by the consideration, that his reduction may operate more extensively than his interest to reduce. It is obvious, that as the amount of a proprietor’s valued rent ascertains a great many important rights, besides that of admission to the freeholders roll, the reduction of decrees of division of valuation, may lead to much more extensive consequences than mere expulsion from that roll ; yet the title of a freeholder to reduce such decrees is undoubted. Again, it is obvious, that in the case of the *Earl of Fife v. Gordon*, the declarator, brought for the purpose of ascertaining that certain sasines were not registered on the day on which they bore to be registered, led to various important consequences, and might have extinguished the completed feudal title of the parties holding them ; but that possibility was not held to exclude the Pursuer from urging the point, in prosecution of the object which, in the character of freeholder, he had in view.

As to the objection founded on the lapse of four months from this enrolment, the procedure at common law is not only independent of the statute, but

anording a reenold quainication. the Appellant maintained to be, and Session held to be, incompetent, as un the court of freeholders, or before the in review of the judgment of the fr this be the law, upon what reasonable it be maintained, that the Responder the limitations of a statute of which found not to have the benefit? If he a to have a legal title and interest to action of reduction, there is no autho taining the incompetency of prosecutin expiry of the period fixed only for proo by the argument of the other party judgment of the Court of Session, ca apply to his case?

Neither will it be found that this vie any evasion of the statute. The statu sibly be evaded, if, after the expiry of actions of reduction or declarator were making good objections, which might have been urged in the form of petitio plaint. But there can be no evasion o disregarding the limitation of the four actions for substantiating objections —

fore, by the conditions of the argument, the act does not apply at all. Besides, it will be found, that the effect of the present action upon the rights of the Appellant as a freeholder admitted to the roll, is perfectly authorized by the terms of the statute alluded to. The statute merely provides, that if no petition and complaint shall be lodged within four months, “the freeholder enrolled shall stand and continue upon the roll until an alteration in his circumstances be allowed by the freeholders, at a subsequent Michaelmas meeting, or meeting for election, as a sufficient cause for striking or leaving him out of the roll.” When the claim of any party to be enrolled is complete in all those points, to which exclusively the jurisdiction of the court of freeholders and the Court of Session, judging on petition and complaint, is limited, these points form the circumstances of the freeholder upon which he obtains an enrolment. If he has a charter and sasine *ex facie* good, and the evidence of valuation attested by a decree of the Commissioners of Supply, he possesses those requisites which the freeholders and the Court of Session, in the procedure by petition and complaint, must admit as the constituent parts of a freehold qualification. But if there exists in any of those constituent parts an error, which a freeholder is found to have a legal interest to correct, it is quite clear that the freeholder who corrects that error effects an alteration of circumstances, which may at any period extinguish the freehold qualification, even after the lapse of the four months. In short, such action is not a complaint against an en-

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rolment, but is an action to alter those circumstances which the freeholders were originally bound to receive as sufficient.

This principle * has been repeatedly recognised in the analogous case of reduction of divisions of valuation, which reduction it has been found competent to bring after the lapse of the four months. In a question betwixt the Earl of Fife and the Duke of Gordon, a reduction of the valuation of certain freeholders was opposed, on the ground that these freeholders had stood for more than four months on the roll, and “ as, therefore no effect could be produced on these freeholds by such reduction, the reduction was incompetent. The Court (August 1774,) repelled the objections to the Pursuer’s title, and found him entitled to carry on the action.” “ This is a judgment on the relevancy, and, consequently, proves that a decree of valuation being reduced, the reduction would be held to be a change of circumstances, which, after the four months, would entitle the freeholders to turn the person off the roll whose valuation had been by such means thrown loose.” Upon this there is the following note : “ In this question the following cases were referred to as precedents. A case where Mr. Pulteney having purchased the estate of Cromarty, disposed certain parcels of superiority to Mr. Rose and others, who were enrolled, and a reduction of the decree of valuation being raised after the expiry of the four months from these enrolments, it came to be argued, whether

* Bell on Election Law, p. 402.

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“ such an action was competent, in respect of the
 “ lapse of four months, the pursuers having no in-
 “ terest in the action, but in the character of free-
 “ holders, the Court (5th July 1768,) found the
 “ action competent for reducing the decree of valua-
 “ tion, and sustained the Pursuer’s title to insist in
 “ the action.”

In another case from Linlithgowshire, a similar
 “ judgment was given. Mr. Bruce applied to be en-
 “ rolled, and no objection was stated to the decree
 “ of valuation on which he claimed: but as the Court
 “ was of opinion that the objection did not appear
 “ *ex facie* of the decree, the objection to his enrol-
 “ ment was repelled. After Mr. Bruce had stood
 “ more than four months on the Roll, a reduction
 “ of the decree of division was brought, and the de-
 “ cree reduced; and on this an objection was lodged
 “ to his remaining on the Roll, when the freeholders
 “ struck him off.”

Even if a reduction were not in general competent
 after the lapse of four months, its competency in the
 present case is protected, by the dependence of the
 original petition and complaint, which was brought
 within four months. For though that application
 was rejected, on the ground of its incompetency
 by the Court of Session, their judgment is the
 subject of an appeal. But as the procedure raised
 within the statutory period is therefore, in one
 sense, in dependence, there can be no doubt of the
 competency of the present action, raised for the sub-
 sidiary purpose of established directly certain points,
 bearing upon the point at issue in that petition and

raising of any action necessary or expecting any of the points involved in it is no distinction between that and the case where the proceedings by petition and writ are still in dependence before the House. Consequently, the Respondent must show on the very same grounds, a right to institute proceedings of a subsidiary nature, in support of the petition, to ultimately warrant a judgment on the petition, ordering the Appellant to be removed from the Roll.

The statute only limited the period within which it was competent to bring the judgment before the freeholders under the review of the petition in summary form; but did not deprive the Respondent of his right at common law to obtain an ordinary action at any time, against a judgment sustained by an undue admission of a person to the rolls. As every person entrusted by law with the guardianship of the roll, he was entitled to challenge every attempt to attach that right (which the law limits to estates of a certain value and extent) to one defective in any respect. It is one class of cases in which he has a

the court of freeholders ; but this does not deprive a freeholder of his interest, and title to obtain redress. It is of no importance that the effect of reduction may be more extensive than his interest demands.

In the course of the argument the *Lord Chancellor* observed, that unless the Respondent could limit the conclusions of his summons to the enrolment of the Appellant he had no interest to reduce the charter ; that the summons asked for a total reduction ; and the utmost the Respondent could obtain by the action was, that the Appellant should be taken off the roll of freeholders ; how that was to be done, by the Court of Session, did not appear :—That the judgment in the former cause was, that the freeholders had no right to inquire ; and now the Appellant, who had obtained that judgment, contended that they ought to have inquired :—That the freeholders, at all events, could not inquire beyond the immediate title :—That, consistently with the judgment, a freeholder might proceed in reducing the title :—That the Judges in the court below were of opinion, that if neither the Crown nor the city interfere, a wrong may be done without a remedy ; but that no remedy could be given upon a summons not stating the grievances really intended to be complained of :—That as the Court of Session had given leave to appeal before the conclusion of the cause, it must be supposed that, in their opinion, notwithstanding the form of the summons, some final judgment might be given :—

form, or whether it could be restricted but that the House could do nothing until they had been decided by Session:—That the cause ought to be referred to the Court of Session to consider the terms of the summons, and to find what remedy they are entitled to give under it, supposing the judgment to stand.

Lord Redesdale observed, that in cases of title, the question was, to what individuals the property belonged:—In the case under appeal the doubt was, whether it belonged to any one, as giving a title to the respect of a freehold in the county:—The pleadings showed, *prima facie*, that the lands were in the county; but that there were questions, whether the lands were of the prerogative, whether the charter could alter the prerogative, whether an additional voter could be introduced upon the county:—That the competency of the action depended upon the Court could do; if the Court could do so, a freeholder could not sue to the effect of

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“ Ordered, that the cause be remitted to the Court of
“ Session to review the interlocutors generally and espe-
“ cially, having regard to the summons and the prayer
“ thereof; and to what the Court, having such regard,
“ can or cannot, according to law, further do in this
“ cause.”

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WILLIAM ARBUTHNOTT, Esq. - *Appellant.*
JAMES GIBSON, Esq. of Ingliston, *Respondent.*

Whether a summons at the suit of a freeholder, praying an unlimited reduction of a charter, &c. can be limited by the Court to a partial reduction, so far as they constitute a freehold qualification.—*Quære.*

Whether upon such a summons (if it may be so limited) judgment can be given in a case where no application had been made to be put on the roll of freeholders, at the time when the action was commenced; but where the party became a freeholder pending the action.—*Quære.*

THE question in this case was similar, in all essential particulars, to that depending between the Respondent and Sir William Forbes, the Appellant in the preceding case.

The lands contained in the deeds forming the title of the Appellant were part of the common muir or burgh muir of Edinburgh. The *reddendo* in the charter was the sum of fifty-two merks sterling, ‘*tanquam pro antiquo censu burgali,*’ &c. ‘*cum servitio burgi, solito et consueto.*’

In the year 1816 a signature was passed in the Exchequer, and a new charter granted, of certain parts of the common muir of Edinburgh, there specially described. In this charter the *reddendo* was the sum of 6s. Scots of *feu-duty*.

The parts of the burgh muir contained in this charter were conveyed away in five different portions, each sufficient to afford a freehold qualification. Of these one was granted, at the price of

960*l.* to the Appellant, being then the Lord Provost of Edinburgh. The lands contained in this disposition are thus described in the charter : ‘ *Totas et integras illas terras et acras de lie burgh muir de Edinburgh, acquisit per demortuum Archibaldum Brown de Greenbank, &c. : Item, Totas et integras terras de Mayfield alias Newlands, cum domibus, &c. : Item, Totas et integras illas terras partes communis moræ de Edinburgh, communiter vocat. lie common vel Cameron Myre, cum pertinent. earund. extenden. in tota ad quinquaginta duas acras terræ,*’ &c. And the disposition was granted by the Appellant to the Appellant himself, ‘ as Lord Provost aforesaid, Kincaid Mackenzie, John Young, Alexander Smellie, and John Manderston, esquires, bailies ; Robert Johnston, esquire, dean of guild ; and John Waugh, esquire, treasurer of the said city, all for the time being ; and also the then remanent members of council, for themselves, and as representing the community of the same.’ Upon the precept of sasine contained in this charter, which was assigned in this disposition, infestment was taken by the Appellant on the 24th July 1816, who thus obtained an apparent title to claim enrolment as a freeholder in the county of Edinburgh.

Before the Appellant’s claim for enrolment was made, the Court of Session had decided in the case of Sir William Forbes, that the objection of the change of tenure could not be stated with effect in the Court of Freeholders, or in a petition and complaint against their decision. The Respondent, therefore, commenced an action of reduction against

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the Appellant, for setting aside the titles by which these lands were made to afford a freehold qualification.

Against this action the Appellant gave in defences, denying the petitioner's title or interest to insist, and the Lord Ordinary, by interlocutor dated February 6, 1818, sustained the objection stated by the defender to the pursuer's title to insist in the present action*.

In pronouncing this interlocutor, rejecting the title of the Respondent, the Lord Ordinary was influenced by the specialty, that the Appellant had not claimed enrolment on the titles sought to be reduced. The Respondent presented two short representations against the interlocutor pronounced by the Lord Ordinary in the present action, which were refused without answers.

The Respondent then presented a petition to the Second Division of the Court, which was remitted to the Lord Ordinary, in respect that no full representation had been laid before him, with power to do as he should see cause.

In consequence of this remit, answers to the petition were ordered; upon considering which, the Lord Ordinary refused the desire of the petition, and adhered to the interlocutor reclaimed against.

* In a note subjoined to this interlocutor the Lord Ordinary observed, that " a difficulty occurred from the decisions sustaining the title of freeholders to reduce a division of valuation, when the party has not been admitted on the roll, &c. But still the Lord Ordinary thinks that the decision in the case of the *Earl of Fife v. Gordon*, 8th July 1774, and the principle upon which that case was decided, ought to regulate the present case. The point now under discussion does not appear to have been argued in the cases referred to, in which the title to reduce divisions of valuation was sustained."

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The Respondent then presented a second petition to the Court : but before this petition was given in, on the 29th June, two days after the last interlocutor of the Lord Ordinary, the Appellant had presented a claim of enrolment to the freeholders of the county of Edinburgh, and that claim had been admitted. Upon considering the petition, therefore, the Second Division of the Court of Session again remitted the case ‘ to the Lord Ordinary, to hear the parties ‘ further, and to do as he shall see cause.’ The Lord Ordinary having considered this petition, with the answers of the Appellant, pronounced the following interlocutor : ‘ In respect the defender has, ‘ since the date of the Lord Ordinary’s last interlocutor, claimed enrolment in the roll of freeholders, ‘ and has been enrolled in virtue of the titles which ‘ have been brought under reduction by the pursuer ; ‘ alters the interlocutor reclaimed against, and sustains the pursuer’s title to insist in the present ‘ action for reducing the defender’s said titles, in so far as the pursuer is interested, as one of the freeholders standing upon the roll of freeholders of the county of Mid-Lothian, as libelled, to reduce the defender’s said titles, and assigns ‘ for satisfying the production.’

Two representations against this interlocutor for the Appellants were refused, without answers.

The Appellant then presented a petition to the Second Division of the Court, which was followed with answers for the Respondent ; after considering which, and hearing counsel in their presence, the Court pronounced an interlocutor, refusing the desire of the petition, and adhering to

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the interlocutor complained of, reserving all questions as to expenses.

Against these interlocutors, which had been pronounced since the enrolment of the Appellant, the appeal was presented.

For the Appellant, *The Attorney General*.

For the Respondent, *Mr. J. P. Grant* and *Mr. W. Adam*.

The case was argued on grounds similar to those stated in the two preceding cases*.

At the conclusion of the three preceding cases, the *Lord Chancellor* observed, that the House could not decide upon the competency or incompetency of the action, as it confessedly could not go to the extent prayed for in the summons, viz. the reduction of the charter and sasine *in toto*; and as the Court of Session had given no opinion on the question, whether they could restrict the summons, and how, so as to give relief at all, the House could not decide, in the first instance, what that relief should be. If it should appear that nothing could be done under the terms of the summons, there could be no competency to sue.

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Ordered and adjudged, That the cause be remitted to the Court of Session to review the interlocutors appealed

* There was in this case the additional circumstance, that the judgment was pronounced upon an event which happened after the commencement of the action.

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from generally and especially, having regard to the summons and the prayer thereof; and to what the Court, having such regard, can or cannot, according to law, further do in this cause; and having also especial regard to the period at which the Appellant was enrolled in the roll of freeholders.

UPON the order above reported, the Respondent having petitioned the Court of Session to carry it into effect, after various proceedings the Lords of the Second Division, on the 18th of May 1824, by a very small majority, pronounced an interlocutor; remitted the cause to the Lord Ordinary that he might assign a day to the defender (Forbes) to satisfy the production; and, after such production satisfied, to make great avizandum therewith to the Court, reserving all objections to the pursuer's title, &c. The Appellant thereupon intimated his intention to appeal against the interlocutor enjoining production; but the Lord Ordinary, notwithstanding this intimation, by interlocutor dated the 29th of June 1824, assigned the 9th of July then next "for satisfying the production in the reduction libelled, with certification;" and by interlocutor dated the 10th of July, reciting that the defender (Appellant) had failed to satisfy the production, "grants certification *contra non producta*, and reduces and decerns and declares conform to the conclusions of the libel, &c." In consequence of this interlocutor the Appellant produced the charter and sasine called for in the summons of reduction, and at the same time presented a petition against the interlocutor of the Lord Ordinary above stated, praying that further procedure in the cause might be stayed until after the meeting of Parliament. Upon this petition the Lords of the Second Division, by interlocutor of the 12th of November 1824, reciting that the production had been satisfied, recalled the interlocutor, and allowed the cause to proceed. Against these interlocutors of the Lord Ordinary and the Court, Sir W. Forbes appealed to the House of Lords, and the appeal was pending until it came in its course to be near the hearing, when the matter was compromised and the appeal withdrawn.

IN the other action a similar course was pursued, and, upon considering the order of remit, the Lords of Session (Second Division)

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by interlocutor of the 18th May 1824, reciting the proceedings and the order of remit, “ repelled the preliminary defence that the action was instituted prior to the period of the defender (Arbuthnott) being put on the roll of freeholders ; remit, &c. to the Lord Ordinary to assign a day for satisfying the production,” &c. After the pronouncing of this interlocutor the same proceedings took place (*mutatis mutandis*) as in the action against Forbes, and a similar appeal was entered, and pending until it was nearly in course of hearing, when the matter was compromised, and that appeal also withdrawn.

ENGLAND.

COURT OF KING'S BENCH.

JOHN HENRY DEFFELL, - *Plaintiff in Error* ;

THOMAS BROCKLEBANK, - *Defendant in Error*.

By mutual covenants in a charter-party of affreightment it was agreed on the part of the ship-owner, that he should provide a ship, which should proceed to Jamaica, and receive on board, from the agents of the shipper, a cargo to be provided by him, according to his covenant after mentioned, and should sail with the June convoy, &c. provided the ship arrived out, and was ready to load sixty-five running days before the sailing of the convoy, which were to be accounted from the day of arrival, and being reported ready to receive goods, &c.; and on the part of the shipper, that he would provide 650 casks of produce in time for the ship to load the same, and join the June convoy, provided she arrived out and was ready to load, and notice thereof given by the agents of the shipper sixty-five running days before the sailing of the convoy, &c. and should pay, &c.

It was further provided by the charter, that if any hurricane, insurrection or invasion should happen, &c. that upon notice, the obligation of the shipper under the charter-party should cease, &c.

In an action of covenant brought by the ship-owner upon this charter-party, the declaration, after reciting the substance of the indenture, stated that the ship arrived at Jamaica, on the 27th of April, &c. and upon her arrival was seaworthy, &c. and ready to receive a cargo of, &c. according to the charter-party, whereof notice was given to the agents of the freighter, and that the ship did at, &c. receive such cargo as his agents thought fit to load on board, &c. and delivered such cargo, &c. according to the charter-party. The declaration then assigned, as a breach, that although no hurricane, &c. prevented, &c. the freighter did not

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provide 650 casks of produce, &c. but, &c. a much smaller quantity; that is to say, &c. being a very insufficient cargo, &c. contrary to the covenant, &c. whereby the ship-owner was prevented earning profit to the amount of 2,500 l.

The declaration then assigned, as a further breach, that although no hurricane, &c. and although the ship arrived, &c. and was ready, &c. and notice, &c. sixty-five running days before the sailing of the June convoy, &c. the freighter did not provide a sufficient cargo to be laden, &c. in time sufficient for the ship to join the June convoy, &c. but detained the ship thirty days after the sailing, &c. whereby the (shipowner) lost the use, &c. was put to expense, &c. and prevented earning freight, &c. to a large amount, to wit, 2,500 l.

To this declaration the Defendant pleaded eleven pleas, the substance of which, as applicable to the first breach, was, that the ship did not arrive, or was not ready, or reported ready, to receive a cargo sixty-five running days before the June convoy was appointed to sail, or did actually sail, and that therefore the charter-party was void; and further, that the Defendant sailed of his own accord with an insufficient cargo.

As applicable to the second breach, the substance of the eighth and eleventh pleas was, that the Defendant did not detain the ship for any time after the sailing of the June convoy, in manner and form alleged.

To all the pleas, but the first, seventh, and ninth, the Plaintiff demurred generally. On the first plea of *non est factum*, the Plaintiff joined issue. The replication to the seventh plea was, that the ship was reported ready to load sixty-five days before the sailing of the June convoy. To the ninth plea, that the master sailed of his own accord with the short cargo, the Plaintiff replied, that after notice of the ship being ready to load, a reasonable time elapsed to deliver 650 casks of produce, &c. On the replications to the seventh and ninth pleas, the Defendant joined issue.

Held that the provision as to the sixty-five running days was not a condition precedent to the obligation of the freighter to furnish a cargo of 650 casks of produce, but applied only to the obligation of the ship-owner, that the vessel in such case should sail with the June

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convoy; therefore that it was not necessary, in the assignment of the first breach, to aver that the ship arrived out, and was ready to load sixty-five days before the sailing of the June convoy.—Held also, that the substance of the assignment of the second breach was the failure to produce a cargo, and not the detention of the ship; and that the plea, by taking issue on an immaterial part of the plea, admitted the material part.

THIS was an action of covenant brought in the court of King's Bench. The declaration stated, by a certain charter-party of affreightment, made on the 13th of January 1812, between the Defendant in error, therein described as part and managing owner of the ship *Balfour*, of the one part, and the Plaintiff in error of the other part; it was witnessed, that the Defendant in error had let, and the Plaintiff in error had taken and hired the said ship to freight for the voyage, and upon the terms and conditions therein contained, whereupon the Defendant in error did thereby covenant, promise, and agree to and with the Plaintiff in error, that the said ship should proceed from Whitehaven (with liberty to call at Cork if required) to Montego Bay, and upon arrival there she should be made tight, staunch, strong, and in all respects sea-worthy, and be well manned, victualled, equipped, provided, and furnished with all things needful and customary for such a vessel and her intended voyage thereafter mentioned, and should thereupon take and receive on board from the agents or assigns of the said Plaintiff in error, in Montego Bay aforesaid, from and out of the usual barquadiers, with the assistance of the ship's boats and people, and at the ship's ex-

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pense and risk, the quantity of 450 casks of sugar and 200 puncheons of rum, and such a quantity of wood as might be requisite to stow the cargo (provided the agents of the said Plaintiff in error gave to the master notice of such their intention within ten days after his arrival) for which the master of the said ship should and would sign the accustomed bills of lading, and the said ship being therewith despatched, should set sail with the convoy that should depart from Jamaica for England in the month of June then next; provided the ship arrived out and was ready to load sixty-five running days previous to the sailing of such convoy, which days were to be accounted from the day of her arrival at Montego Bay aforesaid, and being reported ready to receive goods, and proceed under sailing instructions from the said convoy back to the port of London, and upon her arrival there deliver the said cargo in the West India Docks, agreeable to bills of lading and to the custom of the said Docks, and thereupon the said intended voyage was to end (the act of God, enemies, restraint of princes and rulers, fire, and all and every other the dangers and accidents of the seas, rivers, and of navigation, of what nature or kind soever, excepted), in consideration whereof the said Plaintiff in error did thereby covenant, promise and agree to and with the said Defendant, not only to provide 650 casks of produce as above stated, for the said ship Balfour, to be laden at the usual barquadiers in Montego Bay as aforesaid, and such a quantity of wood as might be requisite to stow the cargo for the port of London, and in time for her to load the same and

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join the June convoy for England, provided she arrived out and was ready to load, and notice thereof was given to the agents of the Plaintiff in error sixty-five running days previous to the sailing of the said convoy, and on her arrival in the West India Docks, London, receive the said cargo out of her, agreeable to the bills of lading, and according to the custom of the port of London, but also well and truly to pay or cause to be paid unto the Defendant in error, or his order, in full, for the freight of the said cargo, the same freight and primage as should be given to other vessels that should load at Montego Bay for London at the same time as the said ship, to be paid at and in the usual and customary time and manner of paying such freights in the West India trade, and general average to be as customary should any accrue; provided always, and it was thereby agreed and understood by and between the said parties, that if any hurricane, insurrection, or invasion by an enemy should happen in the said island of Jamaica, so as to interfere with or prevent the intention and undertaking of Plaintiff in error, his agent or assigns should not be bound or obliged to give said ship the before-mentioned quantity of goods, but, on the contrary, it should be lawful for him or them in that event to cancel and annul the said charterparty, upon giving notice in writing to the master of the said ship of the determination so to do within ten current days after the said ship's arrival at Montego Bay, in the said island, upon which said notice the said charterparty, and every thing thereinbefore contained, should cease and be utterly void as if the same had never been made or

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entered into, and the Defendant in error should have no claim whatsoever for freight in respect of same.

The declaration then stated, that on the 30th January 1812, the ship did sail and proceed from Whitehaven aforesaid upon her said voyage to Montego Bay, and arrived there on the 26th April 1812, and upon her arrival there was made tight, staunch, strong, and in all respects sea-worthy, and was well manned, victualled, equipped, provided, and furnished with all things needful and customary for such a vessel and for the said voyage, and was also ready to receive, and take, and load on board, from the agents or assigns of the Plaintiffs in error in Montego Bay aforesaid, a cargo of sugar, and of rum, and of wood, to stow the said cargo according to the meaning and effect of the said charterparty, whereof notice was given to the agents of the said freighter ; that the said ship did, at Montego Bay aforesaid, receive and take, and load on board, such a cargo of sugar, and rum, and of wood, to stow the said cargo, as the agents or assigns of the Plaintiff in error thought fit to load on board of her, for which the master of the said ship signed the customary bills of lading, and the said ship being therewith despatched, afterwards set sail and departed therewith from Montego Bay aforesaid, back to the said port of London, where the said ship afterwards arrived and delivered such cargo as had been so laden on board her in the West India Docks, agreeably to bills of lading and to the custom of the said Docks, and upon such delivery ended and terminated her said voyage, according to the intent and meaning of the charterparty.

The declaration then assigned a breach, that, although no hurricane, insurrection, or invasion by an enemy happened in the said island of Jamaica, so as to interfere with or prevent the intention and undertaking of the Plaintiff in error to load the said ship, in the charterparty mentioned, with a sufficient cargo, according to the terms and stipulations thereof, yet the Plaintiff in error did not provide, or cause to be provided, the said 650 casks of produce, as and for the cargo of the said ship, to be laden on board thereof at the usual barquadiers in Montego Bay aforesaid, and such a quantity of wood as was requisite to stow the said cargo for the port of London, but, on the contrary, loaded on board the said ship a much smaller quantity of produce, that is to say, 156 hogsheads of sugar, and twenty-four puncheons of rum, the same being a very insufficient and incomplete cargo for the said ship, and contrary to the true intent and meaning of the said charterparty, and of the said covenant of the Plaintiff in error, so by him in that behalf made as aforesaid, whereby the Defendant in error was prevented from earning and recovering so much freight and primage as he otherwise might and would have done to a large amount, to wit, to the amount of 2,500 l.

The declaration then assigned as a further breach, that although the Plaintiff in error was not prevented from loading the said ship in manner above agreed upon, and although the said ship arrived out at Montego Bay, and was ready to load there, and notice thereof was given to the agent of the Plaintiff in error sixty-five running days previous to

ship to join the same convoy at
England on her homeward-bound
port of London aforesaid; but the Pl
detained the said ship for a long spa
wit, the further space of thirty days af
of the said June convoy, contrary to
effect of the said charterparty, and of
of the Plaintiff in error in that behalf
Defendant in error during all that t
lost the use and benefit of the said s
but was also put to greater expense
the maintaining and paying the crew
was likewise prevented from earning a
so much freight and primage as he ot
and ought to have done to a large an
to the amount of 2,500 l.

And the Defendant in error laid h
3,000 l.

To this declaration the Plaintiff in
1st, *non est factum*.

2d. That the ship upon her arriva
Bay was loaded with a cargo of coa
not discharged from the ship for a l
time after her arrival; and that there
sixty-five running days from the time

of the sailing of the June convoy from Jamaica for England.

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3d. That at the time when the ship was reported ready to receive goods, to wit, on the 27th of April in the year aforesaid, the June convoy stood appointed to sail on the 20th June following; and inasmuch as sixty-five running days could not elapse between the 27th April and 20th June, the charter-party became void.

4th. That the ship was reported ready on the 27th April in the year aforesaid, and that such ships and vessels of the June convoy as departed and sailed from Montego Bay for England departed from thence on the 29th June, and within the period of sixty-five days from the day when the ship was reported ready, whereby Plaintiff in error was discharged from his covenant in that behalf.

5th. That the ship was not reported ready sixty-five running days before the June convoy was appointed to sail and depart.

6th. That the ship was not reported ready sixty-five running days before the ships of the June convoy at Montego Bay departed and sailed from thence.

7th. That the ship was not reported ready to receive goods sixty-five days before the convoy was appointed to sail, or actually did sail; and that the master of the Balfour voluntarily remained at Montego Bay after the sailing of the convoy.

8th. After protesting that the ship did not arrive out, and was not ready to load, sixty-five running days previous to the sailing of the June convoy, avers that Plaintiff in error did not detain the said ship at Montego Bay for any time whatever after the

10th. That the Plaintiff in error
to provide the cargo for the said ship
to load the same and join the June
the ship should arrive at Montego Bay
reported ready to load in sufficient time
sailing of the said convoy, to be and re-
tego Bay for the purpose of loading
running days before the ship should
leave in order to join the June convoy
ship did not arrive, and was not ready
load in sufficient time before the sailing
convoy to have enabled the said ship to
in Montego Bay sixty-five running
purpose of loading there, in case the ship
and sailed with the June convoy.

11th. That the plaintiff in error
the ship for any space of time after the
June convoy as alleged in the declaration.

To the 2d, 3d, 4th, 5th, 6th, 8th, &
11th pleas, the Defendant in error demurred
rally, and the Plaintiff in error joined
The demurrers came on for argument
of King's Bench in Easter Term 1811
allowed.

Upon the 1st plea the Defendant

June convoy actually did sail. As to the 9th plea, he replied, that after the ship was ready to receive a cargo, and notice thereof given, a reasonable time elapsed to deliver 650 casks of produce, &c.; and that before the ship sailed the Plaintiff in error did not deliver 650 casks, &c. but refused, &c.

On the replications to the 7th and 9th pleas the Plaintiff in error joined issue. The issues were tried at the Sittings after Michaelmas Term 1814, when a verdict was given for the Defendant in error, and general damages assessed upon both breaches.

In Easter Term 1817, the judgment of the Court of King's Bench upon a writ of error, sued out by the Plaintiff in error, was affirmed in the Exchequer Chamber.

Upon these judgments a writ of error, returnable in Dom. Proc. was sued out in May 1817.

For the Plaintiff in Error :—The *Solicitor General* and Mr. *Bickersteth*.

The covenant to load the ship with 650 casks of produce, &c. is discharged by the circumstance of sixty-five days not having elapsed between the time when the ship was ready to receive that cargo and the sailing of the June convoy from Jamaica, or between the time when the ship was reported ready to receive that cargo and the time when the June convoy was appointed to sail, and the Plaintiff in error was at liberty to send his produce by any other vessel : The judgments are erroneous, because it is not averred in the assignment of the first breach that the ship arrived out, and was ready to load sixty-five

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running days previous to the sailing of the June convoy, which, according to the fair construction of the charterparty, was a condition upon which the obligation of the freighter to load the ship depended, there being no covenant to load her for any other than the June convoy. The second breach being confined to the detention of the ship is answered by the 8th and last pleas, which are admitted by the demurrer. And because the damages being general upon the whole declaration, if any one breach is bad, or is sufficiently answered by the plea, the judgment for the Defendant in error is erroneous.

If this be a condition precedent, the declaration is bad because it is not set forth*. The condition is material and important, as preventing the necessity of stipulation and questions in respect of demurrage. With respect to the goods actually put on board, it was under a new agreement, upon which freight might be recovered. The assignment of the second breach, if not bad for duplicity, as being precisely the same as the first, is qualified by the circumstance of time. It must be proved as qualified and is limited by the qualification. In the last

For the Defendant in Error, The *Attorney General* and *Serjeant Bosanquet*.

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It was not a condition precedent to the obligation on the Plaintiff in error to load the ship with 650 casks of produce, that there should be sixty-five days between the ship being ready, or reported ready, to take in the cargo, and the time of the June convoy sailing, or being appointed to sail from Jamaica, and he was not thereby discharged from his covenant, but only excused for not doing so in time to enable the ship to sail with the convoy.

The proviso has reference merely to the sailing with the convoy in case the ship arrived and was ready sixty-five running days before that time, which appears as well from the construction of that part of the contract, as from the covenant on the part of the shipper. In certain events he is excused from the payment of freight; but no provision is made for avoiding the contract in case the ship should not sail with the convoy, or not arrive and be prepared in time to do so sixty-five running days before the sailing of the convoy. It is a general rule that a covenant is not to be construed as a condition precedent unless it goes to the whole of the consideration. Where it extends only to part, it gives merely a right of action. As to the objection in point of form, the second breach consists of parts; that the cargo was not provided; that it was not provided in time; and that the ship was detained. The plea, by taking issue on the latter part, admits the former. The detention is immaterial, as being under a *vide-licet*, and issue cannot be taken on a fact so pleaded,

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the matters therefore alleged in the pleas as to the detention of the ship are no answer to the breach, the substance of which is the not providing a sufficient cargo.

26th March 1821.

The *Lord Chancellor*, on mentioning the cases which stood over for judgment, observed as to the case of *Deffell v. Brocklebank*, that it had been stated that the twelve Judges had agreed in their judgment upon the questions raised in the case; but as he had doubts upon the subject, it was necessary that he should consider the case fully before he could advise the House to affirm the judgment.

The case was afterwards mentioned by the *Lord Chancellor*, and notwithstanding the doubt expressed on the former mention of the case, it was affirmed without any material observation.

25th May 1821.

Ordered and adjudged, that the petition and appeal be dismissed, and that the interlocutors therein complained of be affirmed.

SCOTLAND.

COURT OF SESSION.

SAMUEL STIRLING, and others, accept-
ing and acting Trustees of *John* } *Appellants*;
Mackenzie, deceased - - - }

ROBERT FORRESTER, Treasurer to the }
Governor and Company of the Bank } *Respondent*.
of *Scotland* - - - }

THE Bank of Scotland having discounted bills to the amount of 8,000 *l.* which were dishonoured, the acceptors becoming bankrupts, agree with the drawers to retain the dishonoured bills, and receive the dividends which might become payable from the bankrupt estates; and, as additional security, to take four promissory notes, indorsed by four sureties, for 2,000 *l.* each, to guarantee the unsatisfied bills, or any balance upon them which might remain unpaid, to the extent of 2,000 *l.* each. This agreement having been carried into effect; when the notes were nearly due, upon the application of the original debtors for delay of payment, the Bank of Scotland gave up one of the promissory notes, and accepted a new one from the surety who had indorsed it; renewed notes were also given by two other of the sureties, and with the fourth surety, a treaty was carried on, respecting a renewal, pending which he died. The dishonoured bills had also been delivered over by the Bank to the original debtors, upon the treaty for the renewal of the notes.

Held, (reversing *pro tanto* the judgment of the Court below,) that the fourth surety and his estate, by the legal effect of the transaction, was discharged as to three-fourths, and liable only as to one fourth, of the balance due upon the dishonoured bills, after giving credit for all monies

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received or receivable from any of the parties upon the bills, or their estates; and that, on payment of such fourth part of such balance, the Bank were responsible to the estate of the fourth surety for all future dividends upon the dishonoured bills.

A COMPANY conducting business at Dunfermline, under the firm of James and George Spence, employed Mr. Paterson, banker in Edinburgh, as their money-broker and banker, lodging in his hands the bills which by the usage of their trade they obtained from their customers at long dates. In return, Paterson and his agents in London, Robertson, and Stein, and Tod and Company, accepted bills drawn by Messrs. Spence, which were discounted with Mr. Hunt, the agent for the Bank of Scotland at Dunfermline. Mr. Hunt, and his cautioners in the bond granted, in consideration of his official trust, were liable to the Bank for these discounted bills, and all consequent loss.

In the autumn of 1810, Mr. Paterson and his agents failed, leaving unretired with the Bank of Scotland acceptances of bills drawn by Messrs. Spence to the extent of 8,200*l.* Being liable for these acceptances, Messrs. Spence proposed that the Bank should retain the acceptances by Mr. Paterson and his agents, and draw the dividends which might be due from the bankrupt estates; and for additional security, that four gentlemen should guarantee the unsatisfied bills, or *any balance* upon them that might remain unpaid, to the extent of 2,000*l.* each. This proposal was accepted by the directors of the Bank; and accordingly Mr. Mackenzie, the Appellants constituent, indorsed to Mr.

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Hunt a promissory note for 2,000*l.* at eighteen months, granted by Messrs. Spence, and bearing date December 1st. 1810. Similar notes of the same date and currency were indorsed to Mr. Hunt, one by Mr. John Spence, another by Mr. Beatson, and a third by Mr. Haig. All these notes were then indorsed by Mr. Hunt to Mr. Forrester, treasurer of the Bank of Scotland, the Respondent; and the unsatisfied bills were also placed in his hands.

The form of the obligation was a promissory note by James and George Spence to Mr. Mackenzie, dated 1st December 1810, and payable eighteen months after date, indorsed by Mr. Mackenzie to Mr. Hunt, and by Mr. Hunt to the Respondent, as treasurer of the Bank.

When the promissory notes thus obtained became nearly due, Messrs Spence again applied to the directors of the Bank for further delay of payment, requesting at the same time that their note indorsed by Mr. John Spence might be given up.

In answer to this application, by a letter from the accountant of the Bank, dated the 27th of April 1812, after stating the balance due on the discounted bills, and the manner in which the payment of that balance was collaterally secured, Messrs. Spence are informed that the directors agree to the liquidation of the balance by a bill or note from Messrs. Spence, jointly and severally with Messrs. Beatson, Haig, Mackenzie, and Hunt, payable three months after date. By another letter of the same date, Messrs. Spence are informed that the directors have ordered their new promissory

“ bertson and Stein, which were inclo
“ ter, and directed to be given up (unc
“ together with the original note fo
“ dorsed to them by Mr. John Spence
“ tee.”

Some time after this transaction, but does not appear, the bills were again re Bank ; and in the accounts exhibited which were made up to the 5th of October is given for the dividends received upon

The directors had taken a renewed note, indorsed by Mr. John Spence, surgeon Navy, dated 27th April 1812, at three 1,997*l.* 4*s.* 2*d.* in lieu of the original 2,000*l.* ; and according to the proposal Messrs. Spence, they expected to receive notes, each indorsed by one of the three whose original notes were to fall due June 1812.

On the 8th of May 1812, Mr. Mac to Mr. G. Spence a letter, in which, a that the bill for 2,000 *l.* which he had about to fall due, and that a dividend was out of Paterson's estate, he says, “ in

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wrote to Mr. Mackenzie, informing him of the new arrangement made with the Bank, that a new note for the whole amount would be forwarded for his indorsement, and if any dividend should be received on the dishonoured bills, it would be placed by the Bank to the credit of the new bills given for their security.

Mr. Mackenzie being unwell when he received this letter, his daughter, Miss Mackenzie, wrote a letter, dated the 13th May 1812, to his agent Mr. Pearson, desiring him to inform Mr. Spence that her father would accept the 2,000*l.* bill when sent.

In answer to this letter, Mr. Pearson, on the 14th May 1812, wrote to Miss Mackenzie, to inform her that he should mention to Mr. Spence what she stated as to the 2,000*l.* bill.

On the 15th May 1812, Messrs. Spence wrote to Mr. Mackenzie as follows: “ I now enclose for
“ your indorsation our note to you for 2,000*l.*, at
“ three months, from 3d June 1812, which please
“ indorse above Mr. Charles Hunt’s name. As this
“ bill is to lie with the Bank of Scotland, and to be
“ applied for our account and behoof solely, we
“ hereby oblige ourselves to free and relieve you of
“ the same, when due, and also oblige ourselves to
“ give you any satisfactory line necessary. We
“ omitted to mention above, that this bill is to re-
“ tire ours for the same amount, indorsed by you,
“ due the 1st-4th June 1812, and that upon lodg-
“ ing this bill with the Bank of Scotland they give
“ up the other one, which we will return you.”

Mr. Mackenzie died on the 21st of May without having indorsed the new promissory note.

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On the 2d of June 1812, Messrs. Spence wrote a letter to the Bank, enclosing their new promissory notes, informing them that Mr. Mackenzie had died before he could fulfil his promise of indorsement, and suggesting, that as Mr. Mackenzie had intended and engaged to indorse the note, it would be the same security to the Bank to let the old note lie over for three months. But the directors would not agree to accept of the new note without the indorsement; and Mr. Mackenzie's original note when it fell due was protested "at the instance of Robert Forrester, Esq. treasurer to, and for behoof of, the Bank of Scotland, the holder, against James and George Spence, manufacturers in Dunfermline, the grantors, John Mackenzie, Esq. indorser, and Charles Hunt, late agent for the Bank of Scotland at Dunfermline, also indorser."

This protest was intimated to Mr. Mackenzie's representatives, by an official letter from the Bank, and was also duly recorded in the books of session.

On the 24th May 1813 the directors demanded from Mr. Mackenzie's representatives payment of the sum contained in the promissory note which he had indorsed, which being refused, an action was brought by the Respondent in the name and on the behalf of the Bank of Scotland.

The case having come before Lord Alloway, as Ordinary, his Lordship, after hearing counsel, granted a diligence for recovering writings, and appointed the Appellants to state in a condescendence the grounds of their defence. Such a condescendence having been lodged, and followed by answers, and the documents upon which both parties founded having

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ing been produced, the Lord Ordinary pronounced the following interlocutor : “ The Lord Ordinary
 “ having considered the condescendence for the De-
 “ fenders, answers thereto for the Pursuer, produc-
 “ tions and whole process, finds, that this action
 “ proceeds on a bill granted to the late Mr. Mac-
 “ kenzie by Messrs. Spence, and discounted by Mr.
 “ Hunt, as the agent for the Bank of Scotland at
 “ Dunfermline : Finds, that this bill was indorsed
 “ by Mr. Mackenzie, together with other three bills,
 “ by Mr. Haig, by Mr. Beatson, and Mr. John
 “ Spence, for 2,000 l. each, in order to operate to
 “ the Bank of Scotland as a security for a sum ex-
 “ ceeding 8,000 l., in which Messrs. Spence then
 “ stood indebted to the Bank, arising from the re-
 “ turned bills of David Paterson, Robertson and
 “ Stein, and Tod and Company, which Messrs.
 “ Spence had negotiated with the Bank : Finds, that
 “ when the bills indorsed by Mr. Mackenzie and the
 “ three other gentlemen became due, although Mr.
 “ Mackenzie was not a joint obligant for the 8,000 l.,
 “ and could only be liable upon his separate obliga-
 “ tion for the 2,000 l., yet, as it appears from Mr.
 “ Sandy’s letter that the Bank were well acquainted
 “ with the nature of the transaction, and that these
 “ four obligants had merely interposed their security
 “ for Messrs. Spence to the amount of 2,000 l. each,
 “ in relief of 8,000 l. due by the Spences to the
 “ Bank, so the Bank could only have proceeded
 “ against them by giving them a proportionable and
 “ equitable relief of the debts which they had been
 “ able to recover from the original obligants : Finds,
 “ that, although it is alleged that the Bank had given

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“ up to Messrs. Spence the bills which they held of
“ Robertson and Stein, which formed part of the
“ 8,000 l., yet this was done merely for the purpose
“ of drawing the dividend from Robertson and Stein
“ and, this being done, these bills were again restored
“ to the Bank ; and credit is given in the accounts
“ exhibited by the Bank for the dividends so drawn :
“ Finds, that when the four bills for 2,000 l. each
“ became due, Messrs. Spence had applied to their
“ friends and to the Bank for a renewal of the same
“ for three months ; and *that it is instructed by*
“ *Miss Mackenzie's letter, written by her father's*
“ *order, that he had also agreed to renew his obli-*
“ *gation for three months ;* and Mr. Haig, Mr.
“ Beatson, and Mr. John Spence, having also con-
“ sented to a renewal of their obligation, new bills
“ upon their part were discounted ; but Mr. Mac-
“ kenzie having died after the bill had been sent to
“ him to be signed, his bill was not renewed, but
“ the former bill was protested, and duly intimated
“ to the representatives : Finds, that in these cir-
“ cumstances the renewal of the other three bills
“ and Mr. Mackenzie *having previously assented to*

“ upon the part of the Defenders to show that the
 “ Bank had attempted to give any of the obligants
 “ the least preference over the rest ; and as it is not
 “ disputed that the balance due to the Bank still
 “ greatly exceeds the sum of 2,000*l.* contained in
 “ the promissory note indorsed by Mr. Mackenzie,
 “ after giving credit for all the sums which they have
 “ been enabled to recover from the other obligants,
 “ decerns against the Defenders as Mr. Mackenzie’s
 “ representatives, for payment of the sum contained
 “ in the said promissory-note, with interest thereon
 “ since the same became due.”

Upon this judgment, the Respondent gave in a representation, in which he prayed the Lord Ordinary to alter the interlocutor, in so far as it connected Mr. Mackenzie’s note with the other three promissory-notes, and either at once to decern generally against the Appellants ; whereupon the Lord Ordinary superseded advising this representation, until the representation, and additional representation upon the part of Mr. Mackenzie’s representatives, came to be advised. And on advising the same, with the representation for the Appellants, he refused the representation, and adhered to the interlocutor complained of.

Two other representations on the part of the Appellants were followed by similar decisions.

Both parties reclaimed by petition to the First Division of the Court ; and the petition of the Appellants was disposed of by this interlocutor : “ The
 “ Lords having heard this petition, they refuse the
 “ desire of it, and adhere to the interlocutor reclaimed
 “ against ;” and, of the same date, their Lordships

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pronounced as follows, on the petition of the Respondents: "The Lords having resumed consideration of this petition, they refuse it as unnecessary."

The parties again offered petitions against these interlocutors, when the following judgment was pronounced on both: "The Lords having heard this petition, they refuse the desire of it, and adhere to the interlocutor reclaimed against."

The cause having afterwards come to be heard before the Lord Ordinary, on the point of expences, the question was remitted to the auditor, with the instruction, that, in taxing the amount, he shall strike out the expence of the representations and petition for the Bank; and, finally, judgment was pronounced, approving the auditor's report, and assessing the expences to the sum of 80 l. 14 s. 11 d. for which, and the dues of extracts, decerns.

Against the interlocutors of 24th November 1815, 17th May, 11th June, 4th July, 28th November, and 10th December 1816, and of 22d January 1817, the Appellants entered their appeal. The Respondent also, on his part, took the necessary measures for keeping open the interlocutors, in so far as they tended in any degree to limit the foundation of his argument. A cross-appeal was entered for that purpose.

For the Appellants, the *Attorney-General*, and
Mr. C. Warren.

Arg.
23 & 28 Feb.

The original proposal, as appears by the letters of Messrs. Spence to the Bank, was to procure security

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to the amount of 8,000*l.**; but this was only to be in aid of the dividends on the returned bills. Each surety was liable till the 8,000*l.* was paid; but his responsibility was limited to 2,000*l.* and was liable to be further limited by payments on the doubtful notes. It was considered as one joint transaction of suretyship, and so the claim was made for the Respondents, as appears by their accounts, in which the expences as to one are charged against all the sureties †; and the Bank had no right to relieve one of the sureties without the privity of the others. The returned bills were given up absolutely, not for the pretended purpose of obtaining the dividends ‡. By giving up those bills to the principal debtors, and taking a new security from one of the sureties, the other sureties were discharged; for then, by that transaction, part of their remedies were lost, and their relative situation was altered.

In any cross-action against J. Spence for contribution, the other sureties could not have had the same remedy; by accepting a new security from J. Spence, they discharged him from the old security. The letter written by Mackenzie's daughter, in answer to the proposal by the Bank, could not bind him, especially as he was not informed of the circumstances. If one of several co-sureties pays more than his share of the debt secured, he has a right of contribution against the others, *Deering v. Lord Winchelsea* §. By discharging the obligation

* See the letters in the appendix to the Appellant's printed case, pp. 13 & 14.

† See the appendix to the Appellant's printed case, the last item of the account.

‡ Letters, 23 & 27 April 1812. Appx. to A. P. C.

§ 2 Bos. & Pul. 270.

applies equally to the case of a part-
ances of Robertson and Stein might
of the inducements to the contract.
the new note, John Spence was discha
original debt, and consequently from
to contribute. At law it has been do
an *assumpsit* is raised against a surety
most, the aliquot part only can be reco
v. *Edwards* *. But in equity the s
cover, from a solvent co-surety, the fu
according to events.

Independently of all other objectio
in prosecuting the remedies against
debtors, was sufficient to discharge the

For the Respondents, *Mr. We*
Mr. W. Adam.

The note given by Mr. Mackenzie
and unconnected with the other no
granting indulgence to the other of
Bank did not weaken their right of rec
Mr. Mackenzie, or his representatives.

The proposal, stated in the correspo
each obligant should be bound for th

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was rejected, and the notes were accordingly taken in a separate form. A bill or a promissory-note is considered as money; and the doctrine of law as to cautioners is not applicable to the case. Ersk. B. 3. tit. 2, s. 31. *Sharp v. Harvey*, 24 June 1808. *Macdougall v. Foyer*, 13 February 1810:

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The bills due by Robertson and Stein were put into the hands of Messrs. Spence, merely in order to enable them to draw, for the Bank's behoof, the dividends due upon them from the bankrupt estate of Robertson and Stein. Messrs. Spence accordingly drew these dividends, which were paid over to the Bank, and were placed to the credit of Messrs. Spence's debt; and, upon this object being effected, the bills were returned, and have ever since remained in the possession of the Bank. The account exhibited by the Bank shows that credit was given for these dividends. The Lord Ordinary was satisfied, that the Respondent's statement on this point was correct, and found accordingly.

The note for 2,000*l.* which was indorsed by Mr. John Spence, was not a surrender, but a renewal.

The transaction with regard to John Spence's note was not essentially different from what was done with regard to the other notes, and the whole complaint of the Appellants resolves merely into this:—that the Bank, instead of doing diligence upon these notes, when they fell due, took renewals of them, and, by thus giving indulgence, injured or weakened Mr. Mackenzie's right of relief.

The cautioner is not free, because the creditor allows the principal debtor reasonable indulgence, and abstains from following out immediate diligence.

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Erskine * lays it down, " That the cautioner continues bound, though the creditor should set the debtor at liberty after he was apprehended by the messenger, but before his actual imprisonment; for, as no creditor can be compelled by a cautioner to use diligence against the debtor, neither can he be compelled by him to consummate an incomplete diligence." Nor is it of any consequence, that, during the delay so granted, one or more of the co-obligants may have become insolvent. The very object of taking a cautionary obligation is to secure the creditor against insolvency; and, if the obligation does not fall in consequence of delay being granted, the circumstance of insolvency afterwards happening cannot at all weaken its effects. This is implied in the passage quoted from Erskine†; and Lord Bankton still more directly, after declaring that the creditor is not entitled to discharge any of the obligants, immediately adds, " His suffering the principal debtor to become insolvent will not prejudice him, because the others jointly bound ought to have secured their own relief; so that the same objection of negligence that they make against him, lies against them."

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Mr. Mackenzie must be held to bar all challenge at the instance of his representatives.

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If the Appellants had not been willing that the renewals of the notes should take place, it was in their power to have guarded against the consequences of that measure. Upon the intimation of the dishonour of the bill, upon which Mr. Mackenzie stood bound, his representatives might have insisted, that the Bank should immediately close the account, and receive their proportion of the loss, corresponding to Mr. Mackenzie's note for 2,000*l.*, but so as not to exceed that sum.

In the course of the argument the following observations were made:—

The Lord Chancellor :—If this were the case of an entire debt, there is no doubt that giving time would discharge the surety. It is clear that, in the circumstances stated, J. Spence could not have been called on for contribution. The transaction with the Bank effected an absolute discharge. It is a new and important question. Suppose the guarantee had been confined to the 2,000*l.*; was it not discharged by the transaction with J. Spence? Is it not discharged to the amount which J. Spence would have been liable to contribute? If the giving up of the bills does not effect a discharge of the sureties, then the amount of the dividend upon them is to be received for the sureties. But is a surety to be put in the situation of being driven into the account of a bankrupt estate, and the question what it may or may not pay? In another point of view, the bills of Robertson and Stein,

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provable under the bankruptcy, were considered as part of the original security. The sureties had a right to stand as *cestui que* trust of the proof. The sureties might thus have received more than they could in any other way. The case* before Lord Kenyon is material. Formerly it was thought that the remedy was only in equity†; but in that case it was held, that if one in the nature of surety paid a debt, he might bring an action against the parties liable for the debt. Until I became acquainted with that case, I thought the remedy must be in equity.

Lord Redesdale :—In the account, credit is given for part of the debt from Robertson and Stein; the Respondents give up the old note, take a new security for a different one from John Spence, and, as part of the transaction, give up to him the bills from Robertson and Stein, and the benefit of the dividends.

The principle established in the case of *Deering v. Lord Winchelsea* is universal, that the right and duty of contribution is founded in doctrines of equity; it does not depend upon contract. If several persons are indebted, and one makes the payment, the creditor is bound in conscience, if not by contract, to give to the party paying the debt all his remedies against the other debtors. The cases of average in equity rest upon the same principle. It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause, the other debtors to be exempt from payment. He is bound, seldom by contract, but always in conscience, as far as he is able, to put

* 8 T. R. 310. See the note in Selwyn's at N. P. vol. i. p. 75.

† See *Toussaint v. Martinnant*, 2 T. R. 105.

the party paying the debt upon the same footing with those who are equally bound. That was the principle of decision in *Deering v. Lord Winchelsea*; and in that case there was no evidence of contract, as in this. So in the case of land descending to coparceners, subject to a debt; if the creditor proceeds against one of the coparceners the others must contribute. If the creditor discharges one of the coparceners, he cannot proceed for the whole debt against the others; at the most they are only bound to pay their proportions.

The Lord Chancellor :—This is a question as to 19 March.
transactions between a creditor and a principal debtor and sureties; and, as to the effect of this transaction, upon the liability of co-sureties. The judgment of the Court below cannot stand in all its parts. It will be necessary, in moving judgment here, to state clearly the doctrines on which we proceed. In the mean time the agents must give answers to the following inquiries: 1. What became of the bills drawn by George Spence, and accepted by Paterson? Whether the bills have been proved against the estates of the several parties, and whether any and what dividends have been received? 2. In what state the bills stand, and who is entitled to a dividend, if made? The result of these inquiries may assist those who have to advise the House upon the judgment. The case is extremely important, as it regards the doctrines of equity upon the liability of co-sureties.

The Lord Chancellor :—In this case, it appears 13 June.
that the firm of James and George Spence em-

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ployed Mr. Paterson as their money broker and banker. It is represented that the transaction was carried on by their lodging bills in his hands, and, in return, drawing bills on him and his agents in London; which, being accepted by them, were discounted with the agent for the Bank of Scotland. Paterson and his agents having failed, leaving the bills, drawn by Messrs. Spence to a large amount, unsatisfied in the hands of the Bank of Scotland. Upon this event, it was agreed that a security should be taken from four sureties, to guarantee to the Bank the payment of any balance upon the unsatisfied bills, which, after receipt of the dividends from the bankrupt estates, might remain unpaid, to the amount of 2,000*l.* each. Four promissory-notes for 2,000*l.* were accordingly made by Messrs. Spence, and indorsed to the treasurer of the Bank, in whose hands the unsatisfied bills were also placed for the purpose of receiving the dividends.

It is represented in the printed case, on the part of the Appellants, that although the securities are in form separate, it was in fact one individual transaction. This is a very important part of the question.

of the sureties (Mr. J. Spence), was to be, and was, in fact, given up before this transaction was completed. Mr. Mackenzie died without having assented to the renewal of the notes, as the Appellants allege. The Respondents contradict that allegation; but I think it appears from the evidence that a treaty was pending, which was not carried into actual agreement.

Under these circumstances, the Bank refused to delay their remedy upon the old note for three months, or to accept of the new note without the indorsement of Mr. Mackenzie; and when the original note fell due, it was protested, and an action was brought upon it against the representatives of Mr. Mackenzie. By the first interlocutor in this action, it is found that the Bank could not have proceeded against the sureties without giving them a proportionable and equitable relief of the debts which they had been able to recover from the original obligants; that the bills of Robertson and Stein had been given up merely for the purpose of drawing the dividend, which, being received, were credited in the account, and the bills returned to the Bank; that Mr. Mackenzie having assented to a renewal, his representatives were not entitled to be relieved from the payment of the original bill; that after the intimation of the dishonour they might have brought the account to a close, and paid their proportion of the loss; that there was no proof that the Bank had given a preference to any of the obligants; and as the balance due to the Bank, after giving credit for the monies recovered from the other obligants, exceeded 2,000*l.* that the Pursuer was entitled to recover.

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On the part of the Appellants it is contended, in contradiction to the finding of this interlocutor, that the bills of Robertson and Stein were given up, not merely for the purpose alleged, but actually and irrevocably, and that the situation of the sureties by that act was altered, and the obligation of Mackenzie thereby released.

The four promissory-notes may be considered as one transaction of suretyship. They are separate in form; but the effect in equity, as to the obligation of the parties, was such, that the creditors were bound to act as if all the notes formed one transaction of suretyship. The ground of complaint against the interlocutor was fully argued at the bar, and is stated in the cases. It will be necessary, in considering the merits of the appeal, to attend particularly to the matter of the correspondence. An application having been made to the Bank by Messrs. Spence for delay of payment, and the delivery of their note indorsed by Mr. John Spence, by a letter of the 27th of April 1812, Messrs. Spence are informed that the Bank will accept, for the balance stated to be due, a new bill from them,

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transaction had taken place. By the Appellants it is contended, that this transaction put an end to the whole demand upon Mackenzie's representatives. The Respondents contend, that at all events the effect was only partial. If the transaction did not put an end to the whole demand, it is necessary to consider what was the effect of the transaction with regard to Mackenzie's representatives, and so far only to relieve them. Under all the circumstances of this case, the latter is the true principle of decision; we cannot go the whole length of the doctrine for which the Appellants contend*.

Lord Redesdale :—This is a case of very great importance, as applicable to all questions where one or more persons make themselves debtors for others as sureties. The cross-appeal was waived; it quarrelled with the principle on which the judgment of the Lord Ordinary proceeded: but that principle was perfectly correct. The interlocutor finds, that
 “when the bills became due, although Mr. Mackenzie was not a joint obligant for the 8,000*l.* and
 “could only be liable upon his separate obligation
 “for the 2,000*l.*; yet as the Bank were well acquainted with the nature of the transaction, that
 “the four obligants had interposed their security
 “for Messrs. Spence to the amount of 2,000*l.* each,
 “in relief of 8,000*l.* due by the Spences to the
 “Bank; so the Bank could only proceed against
 “them by giving a proportionable and equitable
 “relief of the debts which they had been able to
 “recover from the original obligants.” That doc-

* The Lord Chancellor here read the minutes of the proposed order of the House.

action they entered into the obligation
communication with each other.' The qu
upon equity, not upon contract ; and
contract is to be implied. The decisi
v. *Lord Winchelsea* * proceeded on
law which must exist in all countrie
several persons are debtors, all shall be
doctrine is illustrated in that case b
in questions of Average, &c. where th
press contract, but equity distributes th
On the prisage of wines, it is imm
wines are taken ; all must contribute
is where goods are thrown overboard
of the ship ; the owners of the goods
act must contribute proportionally to t
duty of contribution extends to all pe
within the scope of the equitable oblig

The next question is, whether th
findings of the Lord Ordinary are fou
the first is, ".that the bills of Robert
" were given up to the Bank merely fo
" of drawing the dividends." That
disputable ; and the fact rather differe
is stated in the finding. It is ther
" Mr Mackenzie had assented to a --

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Under the circumstances of the case the effect of the transaction seems to be, that the Bank, by their conduct, took upon themselves the situation and obligation of the other sureties with respect to Mackenzie; and therefore the Bank can only demand one fourth of the sum secured from his representatives, because Mackenzie was originally liable to no more.

The Bank having given time, without obtaining the final consent of Mackenzie, made an arrangement with the other sureties as to three fourths of the debt. The first part of the finding of the Lord Ordinary is right and just in principle: the latter part is wrong in point of fact.

Die Merc. 13 June 1821.

Find, that the Governor and Company of the Bank of Scotland, having accepted the promissory-note of James and George Spence to John Spence, and indorsed by him and Charles Hunt, in substitution for the balance due on the bills in the proceedings mentioned, drawn by James and George Spence on, and accepted by, Robertson and Stein, are not entitled to make any demand against the estate of James Mackenzie, deceased, upon the indorsement of the said John Mackenzie on the promissory-note of James and George Spence, dated the 1st of December 1810, in the proceedings mentioned, in respect of the said bills drawn by James and George Spence on, and accepted by, Robertson and Stein: further find, that, under the circumstances of this case, the said Governor and Company are entitled to demand against the estate of the said John Mackenzie, on the said promissory-note of the 1st of December 1810, one-fourth part only of the balance which shall appear to be due to the said Governor and

bills respectively, or their respective discharge of the debt due to the said Company upon such bills: and it is t and adjudged, that the several interloc of in the said original appeal, so far as sistent with these findings, be, and the s reversed: further ordered, that the ca back to the Court of Session in Scotl the balance due from the estate of the kenzie to the said Governor and Con to such findings: and the Lords furthe payment of such fourth part of such l Governor and Company are bound to estate of the said John Mackenzie or any future dividends, which, after the a said account between the said Govern and the estate of the said John Macken: the findings aforesaid, may become pay Governor and Company from the sever said bills, drawn by James and George accepted by, D. Paterson and Todd a respect of such bills respectively: ar ordered and adjudged, that the said dismissed this House, and that the said far as they are therein complained of, be

* See *Rees v. Berrington*, 2 V. J. 540; a R. C. C. 570: the observations of F. J.

INDEX.

N. B.—The initials L. R. subjoined to an article, denote an opinion expressed by Lord Redesdale. In all other cases the opinions are those of the Lord Chancellor.

ABBNEY LANDS. See PRESUMPTION. TITHES.

If a lesser monastery claimed as against an ecclesiastical rector to hold lands discharged from tithes, the discharge not being reserved upon the dissolution of the monasteries, the common law right of the rector revived. But that doctrine is not applicable to the case of two monasteries, the one claiming an impropriation, and the other claiming land, because both the bodies were capable of making a complete alienation.—*R. Norbury v. Meade*, page 235

ACCOUNT. See TITHES.

ACQUIESCENCE. See DEED. LANDLORD AND TENANT.

LEASE. POWER. TEINDS. - - - - 1

In all cases, delay of suit, where parties are cognizant of their rights and under no legal disability, must affect a tardy claim, as importing a conscious acquiescence in what they have supposed to be an adverse right.—

Whalley v. Whalley - - - - 31

Acceptance of rent for many years by a remainder-man upon a lease granted by a tenant for life exceeding his power, does not make the lease valid as against the remainder-man in respect of a clause in the lease for perpetual renewal.—*Higgins v. Rosse* - - 83

ADULTERY. See EVIDENCE.

ANSWER. See FRAUD. ISSUE.

If fraud charged in the bill is denied by the answer, and not proved in the cause, the Court of Equity, having before it sufficient evidence to decide the case, ought not to direct an issue.—*Whalley v. Whalley* - 1

it is necessary that all the magistrate should be parties in the proceeding appellants or as respondents, upon appeal of Lords; as, upon a similar proceeding by action of declaratur, all persons interested are parties.—*Angus v. Montgomery* -

Where the whole body are not before the court, judgment can be given. Cases which have been held contrary to this doctrine (*semb.*) are of doubtful authority. Whether a special objection should be allowed at election, and a vote, put upon the objection as a preliminary to found the complaint. — *Quære. Id.* - - -

The 7 Geo. II. c. 16, s. 7, does not express notice to, and summons of, magistrates as the 16 Geo. II. c. 11, s. 24; but the Act has been passed to explain and amend the former Act. It may be considered in many respects as a new Act. The proceeding under the Act 16 Geo. I. is to be commenced two months after the election or wrong election, and this can apply to a case of continuance upon an election many years before re-election. — *Quære* - - -

In the case of a party, not a magistrate, who has a vote, where the election is void, and the party has demitted his office, being so situated (*semb.*) there is no authority under the Act, and *a fortiori* no authority to hear and determine on summary application - - -

Whether this provision of the Act is

Upon a summary complaint under the 16 Geo. II. c. 11, s. 24, the Court of Session have no power to award *costs in part*, the Act directing that they shall allow to the party who prevails *full* costs of suit.—*Angus v. Montgomery* - - - - - p. 98

CHARTER-PARTY. See PLEADING.

CHURCH. See TITHES.

There never was a time when an impropriation could be made, without providing in some way for the service of the church. After the 15th Rich. II. an endowment of a vicar was required. Before that statute there ought to have been either a vicar endowed, or the service of the church performed by a curate.—L. R. *Norbury v. Meade* - - - - - 247

In the case of an endowed vicar, he must have something out of the rectory. It is incumbent on the rector to show what that endowment is, and how it is limited. The vicar might be endowed with tithes or land, or an annual payment. But the endowment, whatever it may be, ought to be shown, in order to entitle the impropriate rector to all the tithes, &c.—L. R. *Id.* *ibid.*

If the impropriation was before the Statute of Endowments, it was not absolutely imperative by law to endow a vicar. Yet some evidence ought to be given of the impropriation; because all, except perhaps very ancient impropriations, had a vicar endowed, which was required by many of the pope's bulls for the purpose of impropriation; because it was a subject of great clamour in the church, that tithes were appropriated to monasteries, and no provision made for the due service of the church. It is, therefore, important that the actual impropriation should be shown, or that it took place before the time of legal memory, and the payment of tithes, both great and small, ought not be decreed without some such proof of title.—L. R. *Id.* 248.

By proceeding without such proof of title in the case of a rectory impropriate, the protection which ought to be afforded to the church is disregarded. The grant of the rectory is not conclusive proof of the right to great and small tithes, since there may be a vicar endowed

EVIDENCE.

CONSTRUCTION. See **LEASE.** **MA'**
VENDOR AND PURCHASER.

A clause in a deed of tailzie, though c
grammatical, may be intelligible; and
a construction in judgment upon a f
cannot be held unintelligible.—*Elliot* 1

CONTEMPT. See **PRACTICE.**

Courts of equity always act indirectly by
tempt, except where the decision is up
in which excepted case they decree po
rect the sheriff to execute the decr
Kynaston - - - - -

COPARCENERS. See **CONTRIBUTION.**

CONTRIBUTION. See **EQUITY. PRINCIPAL.**

In the case of land descending to coparc
a debt, if the creditor proceeds again
parceners, the others must contribute.

If the creditor discharges one of the copar
not proceed for the whole debt against
the most they are only bound to pay t
—*Stirling v. Forester* - - - - -

COSTS. See **COURT OF SESSION. DECREE.**

Where an appeal is irregular, the respon
sent a counter petition to have it dismi
it as an effective appeal, by answering
to proceed, he will not be entitled to co
Meade - - - - -

Not given, because of delay in the nroa

upon a decree dismissing the bill in the court below, no costs given upon affirming the decree on appeal.—

Whalley v. Whalley - - - - - p. 1

Where the substance of a question had been adjudged by former decisions upon the admission or acquiescence of the party, costs are given upon the affirmance of a subsequent judgment on appeal.—*Mak Dougall v. Hogarth* - - - - - 41

A purchaser brought into court upon a doubtful title ought to be discharged with costs.—*Blosse v. Clanmorris* - - - - - 62

Upon a summary complaint under the 16 Geo. II. c. 10, s. 24, the Court of Session have no power to award costs in part, the Act directing that they shall allow to the party who prevailed full costs of suit.—*Angus v. Montgomery* - - - - - 98

CO-SURETIES. See PRINCIPAL AND SURETY.

COVENANT. See ACQUIESCENCE. PLEADING.

COURT OF SESSION (JURISDICTION OF). See FREEHOLDER.

CREDITOR AND DEBTOR. See CONTRIBUTION. EQUITY. PRINCIPAL AND SURETY.

DECREE. See PRACTICE.

A person purchasing lands under a decree is bound to see that the directions of the decree are observed.—*Colclough v. Sterum* - - - - - 181

Lands in strict settlement, with a power to grant leases, being subject to prior incumbrances, are, by a decree in a suit instituted by the incumbrancers, directed to be sold subject to the charges prior to the deed of settlement. Pending the suit, the tenant for life under the settlement grants leases not authorized by the power, and raises money upon annuities for his life, which he charges upon the lands, and they are sold subject to those charges.

Held (reversing the decree of the court below), on a suit by the remainder-man in tail, that the sale, subject to charges not warranted by the decree, is void.—*Colclough v. Sterum* - - - - - *ibid.*

a deed or instrument arising from obliterated recently after the accident or defective state of the instrument, in party is not excluded by admission or cation. *Quare.*—*Max Dougall v. Ho*
The same principle of decision cannot be cumment (the extract of a decree) in party, as to a record in the keeping of

DESUETUDE. See **MANSE.**

DISCOVERY. See **EQUITY.** **TITHES.**

DIVORCE. See **EVIDENCE.**

DUCAT v. C. OF ABOYNE observed
Manson - - - - -

ENTAIL. See **TAILZIE.**

EQUITY. See **ANSWER.** **CONTEMPT.**

LIMITATIONS (STATUTE OF). **TITH**

The jurisdiction of equity in tithe suits covery and account; if the title is doubtful, the court has no right to ma out directing an issue.—*L. R. Norbu*

The right and duty of contribution is fou of equity; it does not depend upon
Stirling v. Forester - - - - -

If several persons are indebted, and one ment, the creditor is bound in consæ contract, to give to the party paying remedies against the other debtors.—

The cases of average in equity rest upo ciple; there is no express contract,

the owners of the goods saved by that act must contribute proportionally to the loss.—L. R. *Stirling v. Forester* - - - - - p. 590

The duty of contribution extends to all persons who are within the scope of the equitable obligation.—*Id.* 596

It would be against equity for the creditor to exact or receive payment from one, and to permit, or by his conduct to cause the other debtor to be exempt from payment.—*Id.* - - - - - *ibid.*

He is bound, seldom by contract but always in conscience, as far as he is able, to put the party paying the debt upon the same footing with those who are equally bound.—*Id.* - - - - - *ibid.*

ESTATE-TAIL. See CROWN. RECOVERY. REVERSION. VENDOR AND PURCHASER.

EVIDENCE. See FREEHOLDER'S COURT. ISSUE. LEASE. POWER. SCOTS STATUTE, 1707. TEINDS. TITHES.

In a grant of a remainder from an uncle to a nephew for a price grossly inadequate, but purporting in the operative part of the deed to be made in consideration of love and affection, there being no recital to that effect, but the grantee being described as a nephew, a valid will of the reversion, previously made in favour of that nephew, is evidence of the truth of the consideration.

Whalley v. Whalley - - - - - 1

Under a power to lease, reserving the ancient and accustomed duties, &c. and so as there be contained a power of re-entry for non-payment of rent, &c. a lease having been executed, reserving a re-entry in case the rent should be in arrear for fifteen days, and there should be no sufficient distress on the premises—held that upon a trial in ejectment by the reversioner against the lessees, evidence was properly admitted, and introduced into the special verdict; that the usual form of leases of the lands, subject to the power before and after the date of the settlement creating the power, was similar as to the reservation of rent, and the proviso for re-entry in case of non-payment to the lease in question.—*Smith v. Earl of Jersey* - - - - - 290

Proof of indecent familiarities between a wife and a medical

attendant in the family of the husband, held to afford a presumption of adultery, and a sufficient ground for a divorce.

After sentence of divorce in the Commissaries court affirmed by the Court of Session, a verdict and judgment subsequently obtained in an action for damages finding the adultery not proven, is not admissible evidence upon an appeal to the House of Lords to affect the sentence on the judgment of affirmance.—*Boyes v. Baillie* p. 49.

EXCEPTION. See LEASE.

FILMER v. GOTT

Observations upon.—*Whalley v. Whalley* - 13 d m

FRAUD. See POWER. SOLICITOR AND CLIENT.

The purchase of a reversion, by a nephew from an uncle of very advanced age, for a price grossly inadequate to the deed of conveyance in the operative part, but not in the recitals, expressing that the grant was made partly in consideration of love and affection, not impeached on the ground of fraud under the circumstances.—*Whalley v. Whalley* - - - - - 1

A reversion, valued at 6,000 *l.* and upwards, in consideration of annuities secured to be paid on the lives of two very old persons, and valued at less than 400 *l.* is conveyed by a deed executed by an uncle, aged 80, in favour of a nephew, who was so described in the deed. There was no recital that blood formed a part of the consideration; but in the operative part of the deed the grant was expressed to be made in consideration of

set aside the deed, on the ground of fraud, which bill was dismissed for want of prosecution.

In 1812 the devisees of that heir filed a new bill for the same purpose.

Held,—That the description of the party as a relation was equivalent to a recital; that the making the will was evidence of the truth of the consideration of love and affection; that the absence of recital did not afford sufficient ground to presume fraud, which being denied by the answer, and not proved in the cause, no issue ought to be directed, as the court of equity had before it sufficient evidence to decide the case; and on these grounds, and under these circumstances, that the conveyance was rightly held valid, and the bill properly dismissed.—*Whalley v. Whalley* - - - p. 1

The cause of action within the meaning of the statute of Limitations arises when the party has the right to apply to a court of equity: As where a reversion, alleged to have been fraudently purchased, descends in equity to the heir by the death of the ancestor.—

Id. - - - - - 9

Semb. That the time of limitation begins to run from the time when the fraud is discovered, either in the lifetime of the ancestor, or upon the descent.—

L. C. & L. R.—*Whalley v. Whalley* - 12 & 17.

FREEHOLDER.

A summons in an action at the suit of a freeholder, praying that a charter and infestment may be reduced (absolutely), on the ground that the tenure has been unwarrantably changed from burgage to blench, for the purpose of giving a qualification to vote, cannot without limitation be sustained.—*Forbes v. Gibson* - - 517

Semb. that such freeholder has no title to sue unless the conclusion of the summons can be limited to the question of enrolment - - - - - *ibid.*

Whether the Court of Session has power to qualify the conclusion of the summons, and limit it to the reduction of the charter, &c. to the effect of excluding the party claiming under it from the roll of freeholders.—*Quære.*

Supposing the reduction to be capable of being, and to be

in fact so limited, whether the case does not fall under the provisions of the statute 16 Geo. II. c. 11, s. 4, by which the period of bringing complaints is limited to four months. *Quære.—Forbes v. Gibson* - p. 57.

Whether an action at common law to reduce the charter generally, or as conferring a freehold qualification, is competent after the lapse of four months from the time of enrolment. *Quære.—Id.* - - - - - *ibid.*

Whether a summons at the suit of a freeholder, praying an unlimited reduction of a charter, &c. can be limited by the Court to a partial reduction, so far as they constitute freehold qualification. *Quære.—Arbuthnot v. Gibson* 50.

Whether upon such a summons (if it may be so limited) judgment can be given in a case where no application had been made to be put on the roll of freeholders, at the time when the action was commenced, but when the party became a freeholder pending the action. *Quære.—Id.* - - - - - *ibid.*

FREEHOLDER'S COURT.

The Scotch Statute, 1681, c. 2, directing that a roll of freeholders shall be made up, according as the same shall be instructed to be, of the holding, extent, and valuation, in the act specified, and providing that the freeholders shall meet to revise the roll for election, &c. and giving jurisdiction to the Court of Session to determine objections against "any insertion in the roll"—held in the Court of Freeholders and the Court of Session, and on appeal, that the freeholders have no authority

- dent to the right, a power in a court of equity to compel inspection, for the purpose of valuation.—*E. India Co. v. Kynaston* - - - - - p. 162
- Order for inspection of a lace machine, on proceedings for infringement of a patent. — *Brown v. Moore* - 178
- The owner of a coal-mine having wrought under and taken coal from a neighbouring mine, and being about to destroy the pillars under the neighbouring mine to prevent detection, an order was made to restrain the destruction of the pillars, and that the owner of the neighbouring mine should be at liberty to inspect the workings, &c. By a subsequent order, in consequence of obstructions to the inspection, it was ordered that the obstructions should be removed.—*Lonsdale v. Curwen* - - - - - 168

INSURANCE.

- Agents of the owners of a ship, by a letter, saying, “The Brilliant will sail from Nassau for Clyde on the 1st of May, a running ship,” instruct their correspondents to effect an insurance on the ship, which is done accordingly by them, showing this letter to the under-writers. There being a favourable opportunity of convoy, the ship sailed on the 23d of April. On the 11th of May she was captured.
- Held, in the court below, and on appeal, that the expression of the letter was positive, and not the statement of an expectation ; and that the exhibition of the letter being a representation material to the risk covered by the policy, which was not true in fact or in the event, vitiated the policy.—*Denniston v. Lillie* - - - 202

ISSUE. See EQUITY.

- A court of equity having before it sufficient evidence to decide a cause, ought not to direct an issue to a court of law, especially in a case where fraud charged in a bill is denied by the answer, and not proved in the cause.—*Whalley v. Whalley* - - - - - 1
- Where the witnesses who could explain a transaction are dead, it would be unjust to send a case to jury at the risk of deciding against the judicial presumptions arising from the expressions of an instrument, the oath of

Courts of Equity proceed indirectly by contempt in all cases except in decision lands, in which they decree possession to the sheriff to execute the decree.—L. R. *Kynaston* - - - - -

What was the origin of the power of the Court to commit for contempt? It will be difficult to determine; it now stands as it is, and is not confined to cases precisely which have preceded, but is adapted to make the jurisdiction of the Court complete.—*Id.* - - - - -

Courts of Equity giving judgment on the merits of their jurisdiction, in cases of true cases, direct possession to be given, or to attorn and pay rents, or compel the performance of agreements. In the case of chattels, they order specific delivery of the article, and express their decrees and orders on contempt.—L. R. *Id.* - - - - -

In the case of realty, the Court orders the sheriff to deliver possession; if he disobeys, the sheriff is directed to put the party in possession of whom the decree is made. In the case of chattels, the Court operates on the person by contempt, and effects the end accordingly to their practice in such cases to be done *per directum*.—L. R. *Id.*

The substantial question is, whether such a remedy is necessary for the purposes of justice? *Id.*

LANDLORD AND TENANT. *See* INSPECTION.

A tenant, by the terms of his lease, was bound to uphold and maintain the houses let in sufficient tenantable condition during the lease, and to leave them so at his removal, subject to a special provision, that the timber in the sub-tenants houses should be valued at the commencement, and at the expiration of the tack ; and that the out-going tenant should pay, or receive from the proprietor or in-coming tenant, the difference in value at those respective times.

The lease contained a further provision, that if the tenant should build an *additional* steading during the lease, the value thereof, at the expiration of the lease, to be ascertained by arbiters, at that time should be allowed to him. Holding under this lease, the tenant pulled down the old buildings, and built a *new* steading.

It was decided on appeal, reversing in part the judgment of the Court below, that he was not authorized to pull down the old buildings without rebuilding or substituting others in their place ; that the knowledge of such unauthorized acts without interference on the part of the landlord, did not conclude him on the principle of acquiescence, which is not applicable to such a case ; but that the tenant is entitled to the value of so much of the new steading as ought to be considered as an additional steading, and not a substitution for the old buildings, subject to the provision in the lease, as to the timber in the sub-tenants houses. It was held also, that the tenant was entitled to be allowed for so much of the new buildings as, consistently with the former finding, he was entitled to have an allowance for, according to a valuation to be fixed at the time of removal, and not according to actual expenditure.—*Sinclair v. Gordon* - - - - - p. 21

LEASE. *See* ACQUIESCENCE. LANDLORD & TENANT. POWER. TAILZIE.

Exception of the tithes of particular lands in a lease seems to import a claim in the lessor to the tithes excepted ; but the parol declaration of a former owner, that he was not entitled to the tithes, gives a construction to the exception in the lease.—*Norbury v. Meade.* - 261

A lease granted under a power by a tenant for life, exceeding the limits of the power, is not made valid by a renewal under a new settlement by a tenant for life after a lapse of sixty years, and reciting that the lease had been frequently renewed, and although the rent reserved upon the original and renewed leases had been received by the remainder-man in fee for sixteen years, after his interest vested in possession.—*Higgin v. Rosse* - - - - - p. 113

A lease of seventy-seven years is an alienation within the meaning of the clauses of an entail, prohibiting alienation and making void dispositions of the lands entailed. *Elliot v. Pott* - - - - - 134

LESSOR AND LESSEE. See **LANDLORD AND TENANT.**
LIMITATIONS (STATUTE OF). See **FRAUD.**

The cause of action within the meaning of the statute of Limitations arises when the party (claimant) has a right to apply to a Court of Equity: as, where a reversion alleged to have been fraudulently purchased descends in equity to the heir by the death of the ancestor.—*Whalley v. Whalley* - - - - - 9

The time of limitation begins to run from the time when the fraud is discovered, either in the lifetime of the ancestor or upon the descent.—*Id.* - - - - - 12

Courts of Equity are bound to act according to the spirit of the statute; and even in cases where it is not too late to maintain an ejectment, courts of equity have refused to interfere, because evidence has been lost—

repaired, &c. by the heritors, they shall be upholden by the incumbent ministers during their possession, or by the heritors out of the stipend in time of vacancy.

Up to the year 1760 the sum allowed for building manses, upon litigation in the Courts Ecclesiastical and of Session, had not exceeded the amount specified in the statutes, except in cases where the heritors consented. But from the year 1760, it had been the practice in both courts, without the consent of the heritors, to grant much larger sums.

In 1814, the Respondent applied to the Presbytery to ordain the heritors to *build* a new manse, which was decreed accordingly, upon an estimate of the Respondent, amounting to 1,214*l.* The question being brought before the Court of Session, 1,000*l.* sterling was finally decreed for *building a new manse*. The question upon the construction of the act, whether expense of building was not limited to one thousand pounds Scots had been adverted to, but not insisted upon, by the Appellant in his pleas before the Presbytery or the Lord Ordinary, but only before the Court of Session in the last stage of the proceedings. The point raised and discussed in the former stages of the cause was, whether 1,214*l.* or 700*l.*, or any intermediate sum, should be allowed.

Held, that the case fell within the clause of the statute which relates to the repairing of manses, and not within that which relates to building of manses, and with this finding the judgment below was affirmed.—*Dingwall v. Gardiner* - - - - - p. 72

Whether a custom beginning in 1760 can abrogate or control a Scotch Act of Parliament.—*Quære*.

The Defender having by his pleadings in the first instance taken issue upon the sum necessary to build a competent manse, and not having then insisted upon the limitation of the statute, (*semb.*) had waived the objection arising out of the statute; but having finally in a reclaiming petition insisted upon that objection, which the Court referred to the Lord Ordinary as a point not before argued, and the pursuer not having objected, or appealed against the interlocutor by which this refer-

ence was made, the right to insist upon the objection was restored.—*Dingwall v. Gardiner* - - p. 77

MASTER AND SERVANT. *See PRACTICE.*

MEMBER OF PARLIAMENT. *See FREEHOLDER. FREEHOLDER'S COURT.*

MINISTER. *See MANSE.*

MONASTERY. *See ABBEY LANDS.*

PARTIES. *See PRACTICE.*

PLEADING. *See MANSE. TITHES.*

In Scotch pleading, a Defender not having by his defence raised an objection which might have been material to his case, has waived that objection. But if in a subsequent proceeding he raises the question, and a reference being made upon the point by the Court to the Lord Ordinary, the Pursuer does not appeal against the order by which the reference is made, the right to insist upon the objection is restored.—*Dingwall v. Gardiner.* 75

A Plaintiff in equity must state his title in his bill, and unless it is admitted by the defendant, must prove it.

A lay impropriator being plaintiff in a suit for tithes should show when the appropriation was made. If it was since the 15th Richard II. c. 6, he should show the endowment of a vicar. In the absence of such proof *prima facie*, the impropriation is void.—*L. R. Norby v. Meade.* - - - - - 111

By mutual covenants in a charter-party of affreightment it was agreed on the part of the ship-owner, that he should

the agents of the shipper sixty-five running days before the sailing of the convoy, &c. and should pay, &c.

It was further provided by the charter, that if any hurricane, insurrection or invasion should happen, &c. that, upon notice, the obligation of the shipper under the charter-party should cease, &c.

In an action of covenant brought by the ship-owner upon this charter-party, the declaration, after reciting the substance of the indenture, stated that the ship arrived at Jamaica, on the 27th of April, &c. and upon her arrival was seaworthy, &c. and ready to receive a cargo of, &c. according to the charter-party, whereof notice was given to the agents of the freighter, and that the ship did at, &c. receive such cargo as his agents thought fit to load on board, &c. and delivered such cargo, &c. according to the charter-party. The declaration then assigned, as a breach, that although no hurricane, &c. prevented, &c. the freighter did not provide 650 casks of produce, &c. but, &c. a much smaller quantity; that is to say, &c. being a very insufficient cargo, &c. contrary to the covenant &c. whereby the ship-owner was prevented earning profit to the amount of 2,500*l*.

The declaration then assigned, as a further breach, that although no hurricane, &c. and although the ship arrived, &c. and was ready, &c. and notice, &c. sixty-five running days before the sailing of the June convoy, &c. the freighter did not provide a sufficient cargo to be laden, &c. in time sufficient for the ship to join the June convoy, &c. but detained the ship thirty days after the sailing, &c. whereby the (ship-owner) lost the use, &c. was put to expense, &c. and prevented earning freight, &c. to a large amount, to wit, 2,500*l*.

To this declaration the Defendant pleaded eleven pleas, the substance of which, as applicable to the first breach was, that the ship did not arrive, or was not ready, or reported ready, to receive a cargo sixty-five running days before the June convoy was appointed to sail, or did actually sail, and that therefore the charter-party was void; and further, that the Defendant sailed of his own accord with an insufficient cargo.

As applicable to the second breach, the substance of the eighth and eleventh pleas was, that the Defendant did not detain the ship for any time after the sailing of the June convoy, in manner and form alleged.

To all the pleas, but the first, seventh, and ninth, the Plaintiff demurred generally. On the first plea of *non est factum*, the Plaintiff joined issue. The replication to the seventh plea was, that the ship was reported ready to load sixty-five days before the sailing of the June convoy. To the ninth plea, that the master sailed of his own accord with the short cargo, the Plaintiff replied, that after notice of the ship being ready to load a reasonable time elapsed to deliver 650 casks of produce, &c. On the replications to the seventh and ninth pleas, the Defendant joined issue.

Held that the provision as to the sixty-five running days was not a condition precedent to the obligation of the freighter to furnish a cargo of 650 casks of produce, but applied only to the obligation of the ship-owner, that the vessel in such case should sail with the June convoy; therefore, that it was not necessary, in the assignment of the first breach, to aver that the ship arrived out, and was ready to load sixty-five days before the sailing of the June convoy.—Held also, that the substance of the assignment of the second breach was the failure to provide a cargo, and not the detention of the ship; and that the plea, by taking issue on an immaterial part of the plea, admitted the mat-

- In 1726 *A.* grants to *P.* (under whom the Appellant claims) three leases, the two first being of houses and gardens, together with six plantation acres to each; the third lease being of a house, garden, and three acres; and all three leases being for three lives, with a covenant for renewal on application within six months after the failure of each life, on paying 4*l.*, and in case of neglect to forfeit the right of renewal.
- In 1730 a new settlement is made, by which the lands are limited to *A.* for life, remainder to *C.* the son of *B.* (deceased) for life, remainder to the issue of *C.* remainder to several brothers of *C.* for life, in succession, and their issue in tail, in strict settlement; remainder to the right heirs of *C.* with power to *A.* to grant leases for three lives, renewable for ever, of any house and garden in the town of *B.* with ten acres of land, &c., and a similar power to *C.* and his brothers in succession, to lease any *plot* for a house and garden, with ten acres, &c.
- In 1735 the third of the leases granted in 1726 was renewed by *A.* according to the covenant. After the date of this renewal, fines of the lands were levied by *C.* being in possession upon the death of *A.* In 1754 a recovery was suffered to such uses as *C.* and *W.* his son, should appoint, and in default of appointment to *C.* for life, remainder to *W.* and his heirs.
- By articles in 1754, and an Act of Parliament in 1758, the lands were limited to *C.* for life, remainder to *W.* for life, remainder to the issue of *W.* in tail, remainder to the right heirs of *C.* The Act of Parliament in pursuance of the articles vested a power in *C.* and *W.* severally in succession, to grant leases for three lives renewable for ever, of *any plot* for a house and garden in, &c. and any quantity of land not exceeding ten acres.
- In 1779, by deed and recovery, the lands were limited, in default of appointment, to *W.* for life, remainder to *L.* (the Respondent in the appeal) in fee.
- In 1786, *W.* the tenant for life named in the preceding settlement, renewed all the leases by deeds purporting to be executed in pursuance of the covenant for renewal, reciting the original leases of 1726; and that the leases

had been frequently renewed; and containing covenant for renewal as in the original leases.

Further renewals to the same effect, and in the same form, were executed by *W.* in 1790.

W. died in 1791, when the fee vested in the Respondent.

It did not appear, by direct proof or otherwise, than by the recitals in the deeds of 1786, that any renewal had been made between 1735 and 1786. The rents reserved upon the leases were from time to time, and up to 1807, paid to and received by the owners of the lands for the time being, including the Respondent.

In 1807 two of the *cestuy que vies* being dead, application was made to the Respondent for renewal, and upon refusal a bill was filed in Chancery to compel a specific performance of the covenant to grant renewals. The Bill was dismissed without costs, and on appeal the judgment was affirmed, on the ground (*semb.*) that the leases were not warranted by the power.—*Higgins v. Rosse*, p. 112

Where a lease not warranted by a power is granted by a tenant for life, containing a covenant for perpetual renewal, the reversioner, by accepting for many years after he comes into possession the rent reserved upon the lease, does not confirm it so far as to make the covenant for renewal binding upon him.—*Id.* - - - *ibid.*

A power reserved upon a marriage settlement to tenants for life to grant or renew leases for lives, provided a right of re-entry is reserved upon such leases for non-payment of rent, is well executed by a lease for years.

deed, in conformity with the power in the will of *B. M.* and in consideration of the marriage, revoked the uses and devises contained in the will, and appointed and limited the lands, &c. to *F. Earl of G.* and *C. M.* and their heirs, in trust, to hold the same to the uses before limited, until after the marriage, and then to the use of *G. V. V.* for life, remainder to *L. B.* (the grantor) for life, remainder to preserve, &c.; and after the decease of the survivor of them to divers other uses, for the benefit of their issue; and in default of issue, to the use of the will of *L. B.*; and in the mean time, to the use of *L. B.* her heirs and assigns.

In the deed was contained a leasing power to and for *G. V. V.* and *L. B.* from time to time during their respective lives, when, and as they should respectively be in possession of the lands, &c. by indenture or indentures, under their respective hands and seals, attested by two or more credible witnesses, to demise such parts of the lands, &c. as now are leased for lives, or for years determinable on lives, in possession or reversion for lives, or for any number of years determinable on lives, so as there be not any greater estate or interest subsisting at any one time than what will wear out or be determinable on the dropping of three lives, and so as on every such lease there be reserved and made payable, during the continuance of the estates and interests thereby to be demised, leased, or granted respectively, *the ancient and accustomed duties and services, or more, or as great or beneficial rents, duties and services, or more, as now are, or at the time of demising or granting the premises so to be demised, leased, or granted respectively, were reserved or made payable for the same premises respectively, or a just proportion, &c. (except heriots, &c.)* all such rents, duties, and services respectively, to be incident to and go along with the reversion and remainder of the same premises expectant on the determination of the respective demises, &c. and so as there be contained in every such lease a power of re-entry for non-payment of the rent thereby to be reserved, and so as, &c. &c.: and also by indenture under hand and seal,

attested as aforesaid, to demise all or any of the lands &c. for any term absolute, not exceeding twenty-one years, to take effect in possession, &c. so as upon every such lease there be reserved, during the continuance of such lease, so much or as great and beneficial yearly and other rent, and services proportionably, as now is paid, or the best and most improved yearly rent, &c. without taking any fine, premium or foregift, &c.; and so as in every such lease for any term of years absolute respectively, there be contained a clause of re-entry in case the rent or rents thereupon to be reserved be behind or unpaid by the space of twenty-eight days after the times thereby respectively appointed for payment thereof and also by indenture under hand and seal, attested as aforesaid, to demise the lands, &c. wherein any mine, &c.

On the 5th of September 1803, G. V. V. being seized of the lands for life, by an indenture of lease, in consideration of, &c. let premises, part of the lands, in settlement which had been and were then under a lease for years determinable on lives, to C. S. and H. S., their executors and administrators, for ninety-nine years, if C. S. H. S. and J. S., or either of them, should so long live, yielding, &c. the yearly rent of 2*l.* at Michaelmas and Lady Day, and one couple of fat capons on, &c.

The indenture contained a covenant by the lessees for the payment of a proportion, &c. and a covenant for the payment of the yearly rent of 2*l.* and for the performance of the duties, &c. And also a proviso: "that if

ment or performance of all or any of the reservations, covenants and agreements thereinbefore contained, that then and from thenceforth, in all or any or either of the said cases, it should be lawful to and for the said *G. V. V.*, his heirs and assigns, and the person and persons to whom the freehold or inheritance of the premises should belong, into the premises, &c. to re-enter, and the same to have, hold, retain, possess and enjoy, as in his and their former estate, &c."

After the death of the tenants for life, upon a trial in ejectment by the grantees of the devisee under the will of *L. M.* against the parties holding under this demise, it was found by special verdict, that the rents, duties, reservations, and payments reserved by the indenture, and secured by the render, covenants, and power of re-entry therein contained, at the time of making the indenture, were ancient and accustomed, and then were as great and beneficial as any which at the time of making the deed, or at any time thereafter, were or had been reserved in respect of the premises demised; and that the usual and accustomed form of leases of the estate, contained in the settlement for lives or years determinable on lives, as well prior as subsequent to that settlement, was, with a conditional proviso of re-entry, similar to that in the indenture of demise in question.

Held, affirming a judgment of the King's Bench, and reversing a judgment of the Exchequer Chamber, that the evidence from the former leases was properly admitted and introduced into the special verdict; and that the lease in question, according to the practice of conveyancers, was by implication within the terms of the power, and valid.—*Smith v. Jersey* - - - - p. 290

G. H. a tenant for life in a marriage settlement is thereby empowered to make leases for lives of lands in Ireland, at the best rent, without fine. A power was also given with the consent of trustees to raise any sum of money. The trustees, in pursuance of the power, consent that *G. H.* should by mortgaging all or any part of the lands, or in any other manner he should think fit, raise any sum of money not exceeding 5,000*l.*

Under this power and consent *G. H.* in consideration of 300*l.* and a rent, grants to *V. W.* part of the lands in settlement, upon a lease for lives. The grant and a receipt expressing that the 300*l.* was raised under the power and consent as part of the 5,000*l.* were duly registered.

Before and at the date of this grant *V. W.* was the solicitor of *G. H.* who was involved in litigation and in distress.

The rent with the premium, calculated at 6 per cent. were considerably short of the annual value of the lands.

Upon a bill by the tenant in remainder under the settlement to set aside the lease, and on appeal, it was held; that the lease was a good execution of the power to raise money, but void as obtained by a solicitor from his client in circumstances of embarrassment and at an under value.—*Ward v. Hartpole* - - - p. 470

PRACTICE. See **BURGH.** **COSTS.** **EQUITY.** **INSPECTION.** **ISSUE.** **LIMITATIONS (STATUTE OF).**

The Respondent, an impropriate rector, having by a decree of the Court of Chancery been found to be entitled (under the decree made in pursuance of the act 37 Henry VIII.) to the tithes, according to the value, of warehouses in London, occupied by the Appellants, and which never had been rented, the Court has jurisdiction to make an order upon the Appellants as occupiers to permit inspection, for the purpose of ascertaining the value.

Such an order cannot be executed by force, but operates only on the person, as a foundation for process of contempt, and to take the bill, *pro confesso*, if necessary.—

E. India Co. v. Kynaston - - - - 170

An appeal, in which the essential parties are not served with the peremptory order to answer, and do not appear at the hearing, cannot proceed as against one of the Respondents.—*Linwood v. Hathorn* - - 193

Whether according to the practice of the House the hearing of the cause may be adjourned for the purpose of serving the absent parties, on payment of the ordinary costs.—*Quære.*

Agents and servants acting under general orders, but without the special direction of their master, having cut a

tree on the side of a public road, which in falling killed a passenger, the widow and children of the person killed brought an action for damages against the master, and the servants, in which action there was a judgment for the defendants. On appeal against this judgment, the agents and servants, as well as the master, were named as parties in the appeal, but were not served with the peremptory order to answer the appeal, nor brought before the House as parties at the hearing. The proceeding was held defective on this ground, as it would deprive the master of the remedy over or relief against the agents and servants, in case of a reversal of the judgment as against the master alone.

Semb. that under the circumstances of the case, if there had been no such defect of parties, damages ought not to have been given.—*Linwood v. Vans Hathorn.* p. 193

According to ancient practice in suits by lay impropriators, the production of the original grant and a regular deduction of the title by the necessary documents was required. That practice was altered in consideration of the frequent loss of instruments of title. But it is still necessary to produce the original grant, and to prove a possession corresponding with the title. L. R.—*Norbury v. Meade* - - - - - 224

A rector having been by decree found entitled under the Act 37 Hen.VIII. to tithes, according to the value of certain warehouses in London which had never been rented, the court has jurisdiction to order the occupier to permit inspection for the purpose of ascertaining the value.—*E. India Co. v. Kynaston* - - - - - 153

Such an order cannot be executed by force, but operates on the person as a foundation for the process of contempt, and to take the bill *pro confesso*, if necessary, *ibid.*

A decree having been made upon a bill in Equity by a lay-impropriator for an account of tithes, the Defendant in the suit appeals against so much of the decree as relates to part of the lands made subject to the account. The decree is reversed, upon the ground that the plaintiff in the suit has not proved his title; whereupon the Defendant in the suit presents a new appeal against the re-

PRINCIPAL AND SURETY. See EQU

The Bank of Scotland having discounted of 8,000*l.* which were dishonoured, coming bankrupts, agree with the dra dishonoured bills, and receive the divi become payable from the bankrupt es ditional security, to take four promises by four sureties, for 2,000*l.* each to , satisfied bills, or any balance upon t remain unpaid, to the extent of 2,0 agreement having been carried into notes were nearly due, upon the a original debtors for delay of payment, 1 land gave up one of the promissory ne a new one from the surety who had newed notes were also given by two c ties, and with the fourth surety a trea respecting a renewal, pending which h honoured bills had also been delivered to the original debtors, upon the treaty the notes. Held, (reversing *pro tanto* the Court below,) that the fourth suret by the legal effect of the transaction, 1 to three-fourths, and liable only as to a balance due upon the dishonoured b credit for all monies received or receive the parties upon the bills, or their estat payment of such fourth part of such b were responsible to the estate of the for

bution ; but in modern times it has been held, that if one in the nature of a surety pays a debt, he may maintain an action against the party liable for the debt.—*Id.* p. 590

PRO CONFESSO. See **PRACTICE.**

PURCHASE. See **DECREE.**

A purchase under a decree is void if the directions of the decree are not observed.—*Colclough v. Sterum* - 181

RECITAL. See **CONSIDERATION.** **DEED.** **FRAUD.**

The absence of recital that a conveyance is made in consideration of love and affection does not afford ground to presume fraud, when the grantor is described as a relation, and the conveyance in the operative part purports to be made for love and affection.—*Whalley v. Whalley* - - - - - 1

RECOVERY.

Lands being settled by *H.* upon the sons of *R.* successively in tail male, with divers remainders over, and the ultimate reversion to *H.* and his heirs, *H.* is attainted of high treason, and afterwards *B.* the issue in tail, being in possession under the limitations of the settlement, suffers a recovery. Whether it is effectual to bar the reversion vested in the Crown by the attainder.—*Quære.*

A title, depending upon a recovery suffered by a tenant in tail of lands, the reversion of which had vested in the Crown by attainder of the reversioner, is not such a title as a purchaser is bound to accept.

A purchaser brought into Court upon a doubtful title ought to be discharged with costs.—*Blosse v. Clanmorris* - - - - - p. 60

REPRESENTATION. See **INSURANCE.**

REVERSION. See **EQUITY.** **LIMITATIONS (STATUTE OF).**

SCOTS STATUTE, 1681, c. 21. See **FREEHOLDER.**

FREEHOLDER'S COURT.

SCOTS STATUTE, 1707 (CONSTRUCTION OF).

Under the Scots statute, “for making up the tenor of “decreets, whereof the extracts are amissing, and the “registers lost in the fire;” whether the defects of an extract not amissing, but obliterated, can be supplied.

Quære.—*Mak Dougall v. Hogarth* - - - 41

The extract having been in possession of the ancestors or authors of the claimant, whose duty it was to have supplied the defects under the statute or by common law : conjectural evidence to supply a word supposed to be effaced is inadmissible.—*Mak Dougall v. Hogarth* p. 41

SCOTS STATUTE, 1 CAR. II. s. 3. c. 21. See MANSE.

Effect of practice and desuetude in the construction of.

SEMARYNE'S CASE.

Observed upon.—*E. I. Company v. Kynaston* - 164

SHIP-OWNER. See PLEADING.

SOLICITOR AND CLIENT. See POWER.

Upon a bill by a tenant in remainder, under a marriage settlement a lease at an under value, obtained by a solicitor from a tenant for life, being his client, and in circumstances of embarrassment, held invalid and rescinded on the terms of paying for substantial improvements, and the usual terms in Equity.—*Ward v. Hartpole* - 470

STATUTE OF LIMITATIONS. See LIMITATIONS.

STAT. 37 HEN. VIII. See PRACTICE.

STAT. 16 GEO. II. c. 11. s. 4. See FREEHOLDER.

STATUTE 7 GEO. II. c. 16. s. 7.—16 GEO. II. c. 11. s. 24, (CONSTRUCTION OF.) See BURGH.

SURETY. See PRINCIPAL AND SURETY.

TAILZIE. See VENDOR AND PURCHASER.

A deed, in the form of a bond of tailzie, declared in the prohibitory clause that it should not be lawful for the entailor, nor any of his heirs or successors, to sell ; and he and they were thereby bound and obliged not to “ sell, anailzie, wadset, *dispone*, dilapidate, or put “ away the lands,” &c. The irritant clause is thus expressed : “ and if I, or any of the heirs, whether male “ or female successive, shall contravene, &c. by the “ said heirs female, not using the surname, &c. or who, “ whether male or female, and I shall *dispone* the said “ lands, &c. ; and if I, or any of the persons or heirs afore- “ said, whether male or female, shall infringe or alter “ the succession and substitution aforesaid, all such “ deeds, &c. shall be void, &c.”

One of the heirs of tailzie in possession granted a lease for 77 years, at a reduced rent, &c. upon a grassum :

Held, that the irritant clause, though confused and ungrammatical, was intelligible; and having received a construction in judgment upon a former litigation, could not be held to be unintelligible. Held also, that the lease was an *alienation* within the meaning of the prohibitory clause, and that the word "*dispone*" in the irritant clause was equivalent to the word "*alienate*," and rendered the prohibition effectual, and the act of contravention void, in a question between third parties, as lessees, purchasers, or creditors.—*Elliott v. Pott* - p 134

The word deed, in the irritant clause of a tailzie, held not to apply to all the things enumerated in the prohibitory clause, but to be restricted by the context to such deeds as were of the nature to create a debt or burden.—*Barclay v. Adam* - - - - - 275

TENANT IN TAIL. *See* CROWN. RECOVERY. REVERSION. VENDOR AND PURCHASER.

TEINDS (VALUATION OF).

A decree having been made under the authority of the High Commission Court in 1635, valuing the teinds of various lands therein described, an extract of that decree had been produced by the ancestor of the Appellant, in a process of augmentation of the minister's stipend in the year 1720; when it appeared, or was assumed, without objection on the part of the heritor, that the word ascertaining the number of chalders at which the teinds of his lands were valued, had been obliterated by a fold in the paper, (or possibly left in blank;) and in that process consequently the lands were held as unvalued. Upon a similar process, in 1799, it was found by the Court that the valuation of the lands in question, in the decree of 1635, was not legible, and that, although the decree appeared to have been intended as a valuation of the whole parish, and the lands belonging to the Appellant are set forth in the decree, the "valuation annexed to to them is *totally obliterated*." The same course was pursued, and with a similar result, in a process for

augmentation in 1805. In 1814, upon a new process for augmentation, the Appellant as heritor having by his first defence admitted that the word appeared to be obliterated, afterwards produced evidence to show that the word supposed to be effaced was either *ten* or *two*, and that no other word could have occupied the vacant space: and reports to that effect were made by men of skill and experience, in deciphering ancient and decayed instruments, to whom the inquiry was referred.

The original decree had perished among the records of the Teind Court, consumed by fire in the reign of Queen Anne. The extract had remained in the possession of the Appellant and his ancestors.

Held, that the extract not being an original instrument in the possession of the law, but of the party claiming a right under it, whose duty it was to have supplied the defect under the provisions of the statute of Anne (1707), as to the records of the Teind Court destroyed by fire, conjectural evidence could not be admitted to supply the word supposed to be effaced.

Whether, under the provision of the Scotch statute 1707, for "making up the tenor of decreets, whereof the extracts are amissing and the registers lost in the fire," the Lords of Session were empowered to receive evidence and supply the defects of an extract not missing, but imperfect and unavailable, on account of the obliteration of material words.—*Quære*.

TITHES. See ABBEY LANDS. CHURCH. PRACTICE. PRESUMPTION.

A Plaintiff in equity must state his title in his bill, and, unless it is admitted by the Defendant, must prove it.

In suits for tithes, the jurisdiction of a Court of Equity is limited to discovery and account. The title to tithes, as of other real property, is a question of a legal right, upon which a Court of Equity has no jurisdiction; and if the title is disputed and doubtful, the Court has no right to make a decree.—L. R. *Norbury v. Meade*, p. 245

A person suing as lay impropriator, for the tithes of a parish in which there has been within living memory a parish church and a burial-ground, in order to establish his title, must show that there has been an appropriation, and when it was made; because if it was not prior to the 15th Ric. II. c. 6. it is further necessary, according to that statute, that an endowment of a vicarage should be shown, and if the Plaintiff does not allege and prove either that the appropriation was before the 15th Ric. II. or that a vicar has been endowed, *prima facie* the appropriation is invalid.—L. R. *Id.* - 225

Lands which had belonged to one of the lesser monasteries were not exempted as such from the payment of tithes in the hands of the grantees of the Crown, under the stat. 27 Hen. VIII. c. 20. At common law it has been held, that if such lands were otherwise discharged of tithes, the discharge being terminated by the dissolution of the monastery, the right of the ecclesiastical rector revived: but as between two monasteries, the one holding an impropriate rectory, and the other lands within the rectory, whether the same doctrine is applicable—*Quære. Semb.* that the case is not similar to a claim of exemption, as derived from a religious order, nor from unity of possession; but both bodies being capable of making an alienation, the monastery having the impropriate rectory might convey the tithes to the other body holding the lands. It is the case of a right

of exception by conveyance, and *semble*. that it is a title which admits of proof by presumption.—L. R.—*Norbury v. Meade* - - - - - p. 236

Upon a lease of tithes, by the lay impropiator, if the tithes of particular lands are excepted, it might admit of the construction that the lessor is entitled to that which he excepts. But if a former owner of the tithes upon a lease has made a parol declaration that he is not entitled to the tithes of those lands, that declaration is in itself important evidence, and gives a construction to the exception in the lease.—*Id.* - - - - - 257

VENDOR AND PURCHASER. See DECREE. FRAUD. PURCHASE. RECOVERY.

An entail in the prohibitory clause provided that it should not be lawful to sell, alienate, or put away the lands, &c.; nor to alter the course of succession; nor to contract debt, &c.; nor to do or commit any fact or deed, civil or criminal, whereby the lands, &c. might be adjudged, evicted, or forfeited, &c.; nor to permit the estate to be adjudged or affected for any debts or deeds contracted or committed by the grantor or the heirs of entail; it contained an irritant clause in the following words: "All which debts, deeds and contractions are hereby declared null and void, &c." The resolute clause provided that the heir in possession, if he should not redeem any adjudication which might be led against the estate for and upon the debts and deeds of, &c.

A purchaser is not bound to accept a title depending upon a recovery suffered by a tenant in tail of lands, the reversion of which had vested in the Crown by attainder of the reversioner.—*Blosse v. Clanmorris* - - - p. 62

WORDS.

The word *dispone*, in the irritant clause of an entail, is equivalent to the word *alienate* in the prohibitory clause.
—*Elliot v. Pott* - - - - - 134

THE END.







